No. 93-783

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

EDWIN T. SHIMODA, *Administrator, Oahu Community Correctional Center,*

Petitioner,

vs.

RONALD S. BURGO, MELVIN KAUHANE, *Sergeant, Oahu Community Correctional Center,* and HAROLD FALK, *Director, Department of Corrections,*

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner, a high-level prison administrator, ought to be denied summary judgment, notwithstanding the defense of qualified officer's immunity, upon a prisoner's claims under 42 U.S.C. § 1983 and the Eighth and Fourteenth Amendments that challenge the administrator's failure to take additional steps to avert a physical assault on the prisoner by a prison guard who was under investigation for two alleged prior assaults, and had been ordered into a "no contact" position vis a vis inmates, but who had not yet been formally disciplined in that the investigation into neither of the two pending charges was complete?

2. Whether the Court should dispose of this case by (a) summarily granting the writ, vacating the judgment, and remanding for further consideration in light of *Harper v. Virginia Department of Taxation,* 113 S. Ct. 2510 (U.S. June 18, 1993), and/or *Helling v. McKinney,* 113 S. Ct. 2475 (U.S. June 18, 1993), or (b) holding the case in light of the possibility of a similar remand upon the decisions in *Farmer v. Brennan,* No. 92-7247 (U.S. cert. granted Oct. 4, 1993), and/or *Elder v. Holloway,* No. 92-8579 (U.S. cert. granted June 28, 1993)?

PARTIES BELOW

Petitioner Edwin T. Shimoda, Administrator, Oahu Community Correctional Center, together with Harold Falk, Director, Department of Corrections, State of Hawaii, and Melvin Kauhane, Sergeant, Oahu Community Correctional Center, were all named below as defendants in their individual and official capacities. The claims against Director Falk in all capacities in which he was named were dismissed on summary judgment and Director Falk has no further interest in this proceeding. Director Falk is therefore named as a nominal Respondent only. Default was taken against Sergeant Kauhane, and that default was later vacated as to the claims against Kauhane in his official capacity and those claims have been dismissed pursuant to the Eleventh Amendment. The claims against Petitioner Shimoda in his official capacity were dismissed by the District Court pursuant to the Eleventh Amendment. The claims at issue in this Petition under 42 U.S.C. § 1983 run against Mr. Shimoda in his individual capacity only. Damages to be levied against Defendant Kauhane in his individual capacity have yet to be determined, and Mr. Kauhane remains interested in this case, and is accordingly named as a Respondent.

Respondent Burgo, at all times relevant hereto, was incarcerated as a convicted inmate at the Oahu Community Correctional Center ("OCCC"), located in Kalihi, Island of Oahu, Hawaii. At the times at issue OCCC was administered by the Department of Corrections, now Department of Public Safety, State of Hawaii.

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Petitioner Edwin T. Shimoda, Administrator, Oahu Community Correctional Center, in his individual capacity, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in C.A. No. 92-16352 (9th Cir.) on March 17, 1993, as amended by the opinion and judgment entered herein on August 18, 1993.

OPINIONS BELOW

The amended opinion of the United States Court of appeals for the Ninth Circuit entered August 18, 1993, is unreported and is printed in Appendix ("App.") "A," *infra*. The initial opinion of the Court of Appeals, entered March 17, 1993, and the order of the United States District Court for the District of Hawaii, denying Petitioner's motion for summary judgment invoking the defense of qualified immunity, entered July 17, 1992, are also unreported and are reprinted in App. "B" and "C," *infra*.

JURISDICTION

The original opinion of the United States Court of Appeals (Pet. App. A7) was entered March 17, 1993, and a timely petition for rehearing and suggestion of the appropriateness of rehearing *en banc* was filed March 31, 1993. On August 18, 1993, the court of appeals withdrew its original opinion, ordered that a new opinion be entered, denied the petition for rehearing, and rejected the petition for rehearing *en banc*. Pet. App. A1, A24, A25. The time in which this Petition may be filed therefore extends to and includes November 16, 1993, and this Petition is timely. Jurisdiction is invoked here under 28 U.S.C. § 1254(1).

Jurisdiction in the United States District Court for the District of Hawaii was alleged to have been conferred by 28 U.S.C. §§ 1331, and 1367. The jurisdiction of the court

of appeals was invoked pursuant to the "collateral order" doctrine and 28 U.S.C. § 1291, as construed in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and its progeny. This case was properly "in" the Court of Appeals pursuant to the *Mitchell* doctrine, and is therefore properly before this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution provides that

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution provides in relevant part that

> [No State shall] deprive any person of life, liberty, or property, without due process of law. . . .

Section 1983 of Title 42 of the United States Code provides in relevant part that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any Citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

1. On March 26, 1988, Melvin Kauhane, a Sergeant and Adult Correctional Officer employed by the State of Hawaii's Oahu Community Correctional Center ("OCCC"), severely beat inmate (Respondent here)

Ronald S. Burgo, "fracturing Plaintiff Burgo's jaw and causing serious and permanent injuries." Pet. App. A29-A30.[1] As a result of these acts, and an earlier charge pending on March 26, 1988, Kauhane's employment with the Department of Corrections was terminated December 5, 1989, by order of then-Director of Corrections, Harold Falk, and on the recommendation of Petitioner and then-Administrator of OCCC Edwin T. Shimoda, who in turn relied on OCCC discipline committee findings that Kauhane had assaulted inmates at OCCC without cause. *Id.* at A44. Over Shimoda's objection, Kauhane was reinstated by Falk's successor, Acting Director George Iranon, as a result of a grievance filed by Kauhane's employee union, on a "last chance" basis pending the resolution of criminal assault charges against Kauhane arising out of the Burgo Incident. *See id.* A47. On August 19, 1992, Kauhane was convicted in the Hawaii First Circuit Court on criminal assault charges stemming from the Burgo incident, and was sentenced to a term of probation that included 90 days' incarceration. *See Hawaii v. Kauhane*, Cr. No. 89-1951 (Haw. 1st Cir. judgment entered July 19, 1992).

2. At the time of Kauhane's assault on Burgo, charges by two other inmates at OCCC that Kauhane had

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[1] The most pertinent evidence presented on the motion for summary judgment has been reprinted in the Appendix. Appendix "G," *infra*, contains certain declarations and exhibits submitted by Mr. Shimoda in the District Court. Appendix "H," *infra*, contains certain evidence submitted by Respondent Burgo in opposition to the Defendants' motion for summary judgment. Appendix "I" contains an exhibit submitted by Petitioner on reply. Other evidence cited in this Petition will be referred to by reference to the Clerk's Record ("C.R") entry where it appears in the record in the District court, and by reference to the Excerpts of Record ("E.R.") entry whereby the evidence was cited to the United States Court of Appeals, pursuant to its Rule 30-1.2(c).

assaulted them were pending investigation. On April 20, 1987, eleven months before the incident in question, inmate Samuel Kalilikane filed a grievance stating in relevant part with respect to Kauhane:

> The last week of February (27th) 87 approx. 7:30 pm, I was escorted from medical unit to holding unit. On returning I was confronted by ACO Melvin Kauhane. I returned to my cell on the 3rd floor of H/U and after ten minutes had past, I was called again by ACO Wong out of my cell to go to the medical unit. My gate opened. I walked into the 3rd floor office. ACO Melvin Kauhane was sitting in a chair inside the office, and ACO Wong was in his uniform at my side. ACO Melvin Kauhane then stood up and assaulted me with his fists in my face. He was unprovoked by my part and I was knocked to the floor in the corner of the room. The ring on ACO M. Kauhane hurt me badly. I remained on the floor in the corner, Melvin Kauhane continued to viciously kick my face and ribs with his boots while I was verbally threatened and abused by him. ACO Wong saw ACO Kauhane would not stop beating and kicking me, and would not be satisfied by just hurting me. So at that point ACO Wong separated ACO Kauhane from continuing to attack me. I was repeatedly threatened not mention a word of this incident. I was told that I will owe Melvin Kauhane several hundred dollars upon my release from OCCC, and threatened that I must p[er] form oral sex with ACO M. Kauhane and other men also. When I returned to my cell on the 3rd floor H/U I was hurt badly and frightened that it would all re[o]ccur. I was unable to sleep for several days. I feel that if ACO Wong was not present during this beating I received that ACO Kauhane would have killed me that evening. I'm informing the

> facility and will be filing a police report as well. Please assi[s]t me in any way possible. I would like this most serious matter investigate[d] fully and any information I may provide please notify me with your request.

Pet. App. A67-A68. Kalilikane's grievance was ordered investigated on April 24, 1987, by OCCC Chief of Security Fred Ragasa, Petitioner's subordinate. *Id.* A preliminary investigation, completed about May 12, 1987, resulted in the referral of the matter to the Office of Internal Affairs at the Department of Corrections, located in downtown Honolulu. Pet. App. A14. No resolution, in whole or in part, of the Internal Affairs investigation was communicated to OCCC staff at any time prior to the March 26, 1988, incident between Kauhane and Burgo, and OCCC staff, including Petitioner Shimoda, had no authority over the pace and scope of the Internal Affairs investigation.[2]

3. On September 9, 1987, ACO Stephen Adams, pursuant to regulation, filed an incident report concerning the alleged use of force by ACO Kauhane against a second inmate, "pretrial felon ('ptf')" Eugene Randale. In his incident report, ACO Adams thus stated:

> At approximately the date and time shown [September 8, 1987, at 2:00 p.m.,] [w]hile working on the desk (second floor A/block) this writer was informed by Sgt. Manu to lock-up inmate RANDALE, Eugene in Corr. C for four (4) hours. When said inmate came up the stairs he was escorted by Sgt. M. KAUHANE who

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[2] OCCC did not even have "access to the investigation while it was pending at internal affairs," Pl. Exh. "KK" (C.R. 65; E.R. 113). A polygraph exam conducted on December 2, 1987, indicated that Kalilikane was truthful in response to questions about the incident (Pl. Exh. "F" (C.R. 65; E.R. 69)), but there is no evidence that any OCCC staff had knowledge of this before the Burgo assault. *See* Pl. Exh. "KK" (C.R. 65; E.R. 113).

> escorted him to the strip search room. While they were in the strip search room this writer heard what appeared to be a scuffle. This writer then went to the strip room and observed both inmate Randale, and Sgt. Kauhane holding each other by the arms, and talking aloud. After about 20 second both parties let go of each other, after which Sgt. Kauhane went down to the first floor, and said inmate went with this writer to lock-down.
>
> At no time did this writer see anyone hit anybody. This writer also asked inmate Randale if he was hurt. . . . Randale replied "no, he can't hurt me."

Pet App. A70. OCCC Administrator Shimoda assigned this case to OCCC's own investigative staff "because Internal Affairs was taking so long on the other case." Pet. App. A35. OCCC Lieutenant R. Asher was assigned by OCCC Chief of Security Ragasa to investigate the Randle case. Pet. App. A70. On March 14, 1988, twelve days before the Burgo assault, OCCC administrator Shimoda asked for expedition of the Randale investigation, writing to Lieutenant Asher that "[s]ix (6) months have lapsed since the Randle's incident," and directing "[t]hat the investigation must be completed as soon as possible." Pet. App. A50. Shimoda imposed a "suspense date" (deadline) of March 22, 1988, four days before the Burgo assault, for Lieutenant Asher's report. *Id.*

4. ACO Kauhane, at all relevant times, was the subject of a "no inmate contact" order entered on June 18, 1987, after the Kalilikane grievance was filed and referred to Internal Affairs at the Department. According to this notice "ACO Melvin Kauhane will be assigned to the Second Watch Security, with Saturday/Sundays off until further notice. He is to have NO INMATE CONTACT

until further notice." Pet. App. A66.[3] OCCC Chief of Security Fred Ragasa directed this no-contact order. As OCCC administrator Shimoda testified in his declaration:

> At all relevant times herein, it was the practice at OCCC to assign employees accused of excessive use of force against inmates, to posts involving no inmate contact pending investigation of the complaint, where appropriate in the discretion of the supervisor, Where an adult corrections officer was involved, the policy would be implemented by the Chief of Security, the supervisor responsible for the security staff.

Pet. App. A36. Shimoda also had no day-to-day role with respect to the making of post assignments. That task was performed at least two levels down in the chain of command, by the Watch Captains, who worked under OCCC Chief of Security Ragasa. *Id.* ¶ 6. Thus, Shimoda attested below:

> As far as I know, Sgt. Kauhane was assigned to a post with no inmate contact following the April 20, 1987 and September 8, 1987 complaints. Exhibit H [Pet. App. 66] is a true copy of a memo dated June 18, 1987 from Fred Ragasa, Chief of Security, stating that Sgt. Kauhane is to have no inmate contact until further notice. I am not aware of any further notice countermanding this memo.

Pet. (App. A36-37); Indeed, Shimoda also testified, without specific facts in the record to the contrary, that "[o]n March 26, 1988, I did not know that Sgt. Kauhane was

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[3] March 26, 1988, the day of the "Burgo" incident, was a Saturday, a day of the week Kauhane was explicitly barred from working by the original "no-contract" order issued after the Kalilikane incident. September 8, 1987, the day of the "Randle" incident, was a Tuesday, a day that Kauhane was allowed to work.

working in contact with inmates. Had I known this, I would have directed his supervisor, the Chief of Security, to make sure that he was removed from inmate contact until the pending investigations were completed." *Id.* at A37.[4] Ragasa confirmed that the first "no inmate contact" order, issued after the Kalilikane complaint, was in effect against Kauhane throughout the period at issue, and that the schedule of watch and post assignments were "not reviewed by the Administrator or the Director." Pet. App. A40. Ragasa, the officer responsible, "d[i]d not know how Kauhane came to be assigned to Special Holding on March 26, 1988." *Id.*

5. Moreover, as Director of Corrections Harold Falk testified below without contradiction, a "no inmate contact" assignment order is inherently impossible to carry out, for in the absence of suspending an ACO from work entirely, it is virtually impossible to avoid at least some inmate contact when working at OCCC. *See* Pet. App. A73. For this reason, the principle deterrent to excessive force lay in the prison rules, regulations, and policies, and the threat not only of criminal prosecution but employer sanctions against offending ACOs. At all times the use of excessive force at OCCC was expressly illegal

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[4] This declaration, under penalty of perjury, is consistent with Shimoda's deposition, wherein he describes the process for issuing "no inmate contact" orders: "[Ragasa] put out the notices. If there were cases that were brought to my attention that required the separation of staff from inmates, I would meet with him and let him know of the case and he would issue a memo." Pl. Exh. "AA" (C.R. 65; E.R. 99) (Shimoda Dep.). Indeed, Mr. Shimoda testified that he "firmly believe[d]" that a second "no inmate contact" memorandum was issued after the Randle incident was reported. Pl. Exh. "BB" (C.R. 65; E.R. 101). Although documentation of this order was not produced below, no witness below denied that such a "second order" was in effect.

not only under the policies and procedures manual promulgated by the Department of Corrections (formerly Department of Social Services and Housing) (Def. Exhs. "A" and "B" (C.R. 54; E.R. 26-38)), but also under the express policies of the OCCC promulgated by former administrator Shimoda himself in December 1983 (Pet. App. A51-65.). At the same time, the internal adjudication of excessive force incidents within the prison system of necessity was a time-consuming function. This is so because the infliction of sanctions upon Adult Corrections Officers, who are both civil servants and governed by collectively bargained grievance procedures, must comport with procedural requirements to be valid (*see* Pet. App. A74-77). In particular, even a suspension of an ACO must be preceded by notice to the ACO and an opportunity for the ACO to be heard, as well as "a full investigation or fact-finding of the particular incident." Pet. App. A75. Indeed, the difficulties in removing correctional officers from their duties is amply demonstrated by the fact that, despite Shimoda's diligent efforts to fire Kauhane after the Burgo incident, Kauhane ultimately remained on the job, with only a brief suspension, until the day he was convicted of assault on August 18, 1992.[5]

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[5] On May 8, 1988, Lieutenant Asher recommended that the Randle incident "be referred to a disciplinary committee for further disposition," particularly in light of Kauhane's "denial on recollection of any events that [are] alleged to have taken place on September 8, 1987." Pl. Exh. "I" (C.R. 65; E.R. 72). Kauhane did not appear at the subsequent hearing on the Randle charges, and was found guilty by the committee and Shimoda largely on the basis of the inmate testimony, as corroborated by that of ACO Adams to the effect that there was a " 'scuffle that sounded like bodies bouncing off the wall like they were wrestling.' " Pl. Exh. "K" (C.R. 65; E.R. 75). For this infraction, Shimoda recommended that Kauhane be dismissed with prejudice. On August 15, 1988, the hearing committee found Kauhane

6. Burgo filed the instant action in the District of Hawaii on March 22, 1991, naming ACO Kauhane, Administrator Shimoda, and Director Falk as Defendants. Pet. App. A24. Burgo ultimately alleged that Petitioner Shimoda should be assessed damages in his personal capacity under 42 U.S.C. § 1983 and the Eighth and Fourteenth Amendments in that Shimoda allegedly "received prior notice of Defendant Kauhane's pattern of using unnecessary, unreasonable, unjustifiable and excessive force against prisoners," and "demonstrated deliberate indifference and instituted or allowed to be instituted the practice, policy, custom or usage which allowed the

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guilty of physical abuse in the Burgo case. Shimoda concurred in this finding and repeated his call for Kauhane's dismissal. Pl. Exh. "L" (C.R. 65; E.R. 76). On November 14, 1989, Director of Corrections Falk concurred, and Kauhane was notified of his termination effective December 5, 1989. Pet. App. A44. Kauhane grieved his dismissal. The grievance was settled April 23, 1990, with the imposition of a twenty-two day suspension and reemployment on a "last chance" basis. Pet. App. A47-48. Shimoda strongly opposed the settlement, as evidenced by both his deposition testimony, *see* Def. Reply Exh. "A" (C.R. 66; E.R. 119 (Shimoda Dep. at 70)), and by his contemporaneous insistence that, if the dismissals arising from the Randle and Burgo incidents be dropped, that sanctions still be pursued as a result of the Kalilikane case, which had been closed as moot when the internal affairs office filed its report after Shimoda had already twice recommended that Kauhane be fired. *See* Pl. Exh. "P" (C.R. 65; E.R. 82). Nonetheless, Shimoda's views on reinstatement did not prevail within the Administration, principally due to the fact that the issuance of a "no-contact" order gave rise to the union's claim that Kauhane had been placed in administrative "double jeopardy" that precluded management's infliction of the remedy of dismissal after it had already presumably dealt with the incident. *See* Pl. Exh. "N" (C.R. 65).

use of unnecessary, unreasonable, unjustifiable and excessive force against prisoners at Oahu Community Correctional Center." Pet. App. A32-33. The Attorney General refused to represent Kauhane, and, by answer (C.R. 49; E.R. 10), and motion for summary judgment (C.R. 54; E.R. 14) invoked the defense of qualified immunity.[6]

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[6] Defendants argued, first, that Plaintiff's evidence, even viewed with all reasonable inferences in his favor, could not prove that Shimoda violated the Constitution "at all" (*see Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991)), or, at the very least, did not violate "clearly established American law" (*see Anderson v. Creighton*, 483 U.S. 635 (1987)). Thus, Petitioner urged: "Shimoda was a facility administrator three levels above Sgt. Kauhane, with a Chief of Security and a Watch Captain performing direct supervision over the security staff," and "[l]ack of personal involvement is not sufficient for Eighth Amendment liability under the high state of mind requirement" imposed by Supreme Court precedents for the awarding of even injunctive relief, much less the more particularized requirements of involvement and causation required regarding damages claims. *See* C.R. 54 (mem. at 6 (citing and quoting *Lee v. Murphy*, 844 F.2d 628 (9th Cir. 1988))). *See also id.* at 5 n.1 ("it could not be concluded here that a reasonable prison official in the shoes of Director Falk or Administrator Shimoda could have believed he or she was violating a clearly established right of the Plaintiff") (citing *Anderson, supra*, and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

Petitioner also stressed that "the proper inquiry is whether the state officials acted reasonably under settled law in the circumstances" (C.R. 59 (mem. at 2) (citing *Hunter v. Bryant*, 112 S. Ct. 534 (1991))), and that immunity must be granted unless a reasonable factfinder could conclude that Shimoda was " ' " plainly incompetent" ' " with respect to federal law (*id.*) (quoting *Hunter*). Petitioner urged he had not " 'caused' Kauhane to act maliciously toward Plaintiff" (*id.* at 5), and, indeed, it was only recently (if at all) settled that, if Kauhane's presence on the facility implicated Shimoda at all, Shimoda's conduct was to be judged, for Eighth Amendment purposes, under a "deliberate indifference standard," rather than under

7. Although it granted Director Falk's motion for summary judgment, the District Court, on July 17, 1992, denied Administrator Shimoda's motion, pursuant to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), directed to those claims against him in his individual capacity. The court interpreted a Ninth Circuit decision that had affirmed a summary judgment dismissing on the merits Eighth Amendment claims by an inmate who had been stabbed by another inmate in full view of prison officials (*Leer v. Murphy*, 844 F.2d 628 (9th Cir. 1986)), as creating a "clearly established" right that bars prison officials "in a position to take steps to avert an assault" from failing to do so "intentionally or with deliberate indifference." Pet. App. A22. Because, in the District Court's mind, after the Randle incident "Shimoda should . . . have been alerted to the possibility that his 'no inmate contact' policy was not being properly implemented and that defendant Kauhane could remain a potential danger to other inmates unless the policy was properly enforced," a triable dispute lay on the merits, and, therefore, "[t]here is a

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the "malicious and sadistic test" employed in *Whitley v. Albers*, 475 U.S. 312 (1986). *See* C.R. 59 (mem. at 5-6) (discussing *Whitley*); C.R. 54 (mem. at 7 (discussing *Wilson v. Seiter*, 111 S. Ct. 2321 (1991))). Petitioner also urged it was not "plainly incompetent" to believe, in 1988, that, even if "deliberate indifference" were the test, that Shimoda could not be found to be "deliberately indifferent" in light of his role at the prison, the quality and scope of information made available to him, and the actions he did take (in expediting the Randle investigation) (C.R. 59 at 6-7). Thus, cases allowing Eighth Amendment claims to proceed had dealt with known threats to specific inmates by other dangerous *inmates*, not by generalized risks posed by a lone prison guard who is to be presumed innocent and was merely alleged at the time to have been involved in two unsubstantiated incidents of excessive force (*id.* 6 (citing *Berg v. Kinchloe*, 794 F.2d 457 (9th Cir. 1986)).

disputed issue of material fact as to whether Shimoda falls into th[e] category" of having violated the "*Leer* right" which the Ninth Circuit "established." *Id.* A19-20, A22.

8. On March 17, 1993, the Ninth Circuit affirmed the denial of Shimoda's summary judgment motion invoking qualified immunity, and, ultimately, reaffirmed its decision in a modified opinion filed August 18, 1993. Pet. App. A1, A7. The Ninth Circuit essentially adopted the "position to take steps to avert an assault" test relied upon by the District Court, and held that, because "it was clearly established that the use of excessive force against prisoners by prison personnel violated prisoner's eighth amendment rights," and "[i]t was also clear that prison officials would be liable in their personal capacities under section 1983 if their conduct caused the violation," Shimoda was not entitled to qualified immunity on the summary judgment record. Pet. App. A4-A5. The Ninth Circuit rejected Petitioner's contention that "the 'deliberate indifference standard' " "is inapplicable," relying on pre-1988 Ninth Circuit authority that had indicated that "prison officials would be personally liable under section 1983 for a deprivation of a prisoner's eighth amendment rights resulting from an assault by a prison guard if the officials' conduct 'caused the deprivation.' " Pet. App. A4 (citing *McRorie v. Shimoda,* 795 F.2d 780, 783 (9th Cir. 1986)). Thus, "the district court correctly determined that Burgo's right not to be subjected to excessive force by prison personnel was clearly established, as was the responsibility of supervisory prison personnel not to act with deliberate indifference." Pet. App. A4-5. The Ninth Circuit also held that "issues of fact must be resolved in order to determine whether Shimoda 'knowingly violated the law' by failing to take steps to prevent Kauhane from repeating his physical attacks on inmates." Pet. App. A5.

9. In so doing, the Court of Appeals did not even cite, much less discuss, the undisputed facts of Shimoda's or his subordinates' particular efforts to take action against Kauhane, including (1) promulgating specific policies prohibiting staff attacks on inmates; (2) referring the Kalilikane incident to internal affairs for investigation; (3) issuance of the no-contact order against Kauhane; (4) referring the Randle incident to his own staff for investigation because the Internal Affairs investigation was taking so long; and (5) mandating expedition in the Randle investigation on March 14, 1988, and demanding a report from no later than March 22, 1988, four days before the Burgo assault took place. The Court of Appeals also found that, whatever this Court might have said in such cases as *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), or *Hudson v. McMillian*, 112 S. Ct. 995 (1992), about the scope of the Eighth Amendment, "does not affect our determination whether Burgo had a clearly established right at the time of the alleged violation, for purposes of Shimoda's claim of qualified immunity." Pet. App. A5 n.1. Thus, the Ninth Circuit found that any decisional law from this Court post-dating the acts in question could "not affect" an official's qualified immunity because only " 'preexisting law' " is relevant to that inquiry. *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

REASONS FOR GRANTING THE WRIT

This case presents important and recurring questions concerning, in general, the doctrine of objective qualified immunity laid down by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and the interaction of that doctrine with the continuing debates in this Court over the scope of supervisory liability under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and, just as importantly, the scope of the Eighth and Fourteenth Amendments as engines for

review of employee discipline actions by senior level administrators in prisons across the Nation.

At the outset, the Ninth Circuit's refusal to recognize that *any* decisions of this Court handed down after the acts at issue have occurred can even "affect" the qualified immunity analysis is a direct threat to this Court as it discharges its exclusive role in defining "American law" in a controlling manner for all lower courts, state, and federal, in this Nation.

Indeed, the Ninth Circuit's refusal to take into account the full array of doctrine not only is contrary to principles of retroactivity that this Court has recently enunciated in *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993), but fundamentally transforms the focus of the immunity inquiry from "clearly established American Law," *see Anderson v. Creighton*, 483 U.S. at 646, to a narrow view of the "law of the circuit." Such a transmutation constitutes the very sort of "Balkiniz[ation] [of] the rule of qualified immunity" that this Court condemned in *Creighton*, and has repeatedly condemned since. *See Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991); *Burns v. Reed*, 111 S. Ct. 1934, 1944 (1991); *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991). In ordering this Balkinization, the panel created an enormous inter-circuit conflict as to what constitutes "clearly established law" for purposes of immunity. *See Lum v. Jenson*, 876 F.2d 1385, 1389 (9th Cir. 1989) (noting the conflict).

In addition to constricting the immunity inquiry in a temporal sense, the Ninth Circuit has wholly distorted the height and width of the Eighth and Fourteenth Amendments with respect to the duties those Amendments impose on senior level prison administrators, on the one hand, to safeguard the physical well-being of

their prisoner wards, and, on the other, to address properly, and in accordance with Due Process, accusations of wrongdoing by prisoners against the line-level correctional officers who are put in the most difficult positions vis a vis some of the most unruly, dangerous, and conniving individuals in our society.

Only as recently as last Term, this Court held emphatically that, for conditions of confinement that present environmental risks to be considered violative of the Eighth Amendment, they must at a minimum "be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Helling v. McKinney*, 113 S. Ct. 2475, 2482 (U.S. June 18, 1993). This standard, applied to the facts of this case, and even holding aside the Due Process rights Melvin Kauhane enjoyed (and which inanimate risks such as environmental tobacco smoke do not enjoy), dictates qualified immunity in this case. No factfinder could say that Petitioner was " 'plainly incompetent' " in not taking further steps under the *Helling* standard. Indeed, under *Hudson v. McMillian*, Kauhane's use of force itself would not have been held unconstitutional *at all* unless it was imposed "maliciously and sadistically to cause harm." *Hudson v. McMillian*, 112 S. Ct. 995, 999 (1992). Given this standard, it is absolutely clear that it was wrong for the Ninth Circuit to strip the broad protection of qualified immunity from any official who "failed to take steps" to prevent an assault by a wayward guard. Indeed, it was not until *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), long after Shimoda acted here, that this Court even hinted that the "deliberate indifference" test would apply to prison conditions in a general fashion, much less those conditions that, as the Court was to hold in *Helling, supra*, posed only an incipient risk of physical harm.

The Ninth Circuit's decision, however, is even more disturbing in that it wholly ignores the countervailing pressure of the Due Process interests of lower-level prison employees who are frequently accused wrongly of misconduct by the inmates whose confinement they are bound by law to enforce. It was not until this Court decided *FDIC v. Mallen*, 486 U.S. 230 (1988), in May, 1988, more than a month after Kauhane attacked Burgo, that pre-hearing suspension of non-civil service employees who are charged by Grand Jury could be effected for extended periods prior to the ultimate litigation of their continued entitlement to hold office. The very pendency of *Mallen* on March 26, 1988, ought to have dictated dismissal of the claims in this case.

As this Court's most recent grant of certiorari in *Farmer v. Brennan*, No. 92-7247 (U.S. cert. granted Oct. 4, 1992), makes clear, the issue of prisoners' placement within a penal institution is, at a minimum, one of great difficulty on which lower courts are divided, and on which guidance from this Court is needed. The very fact of this grant of review signifies that the decision below is wrong. This case concerns, at a minimum, analogous questions of institutional governance, wherein an administrator "must predict not just one inmate's [or guard's] future actions," but those of "an entire institution." *Hewitt v. Helms*, 459 U.S. 460, 474 (1983). The relevant question here is whether "the question was open at the time [Shimoda] acted." *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). This Court has sustained, on the merits, at the directed verdict stage, conduct much worse than that at issue here, *see Davidson v. Cannon*, 474 U.S. 344 (1986), and in forcing Mr. Shimoda to trial, the ruling here not only eviscerates this precedent, but essentially nullified the protective rule of qualified officer's immunity.

Because the time to seek rehearing expired before this Court's decisions in *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993), and *Helling v. McKinney*, 113 S. Ct. 2475 (1993), were handed down, this Court may wish to grant the writ, vacate the judgment, and remand for further consideration in light of *Harper* and/or *Helling*. The Court may also wish to hold the petition pending rulings in *Farmer v. Brennan*, No. 92-7247, and/or *Elder v. Holloway*, No. 92-8579, which may also affect the immunity issue. At the least, the writ should issue.

I. Review Should Be Granted To Correct the Ninth Circuit's Unprecedented Determination that Decisions of this Court Handed Down After the Acts At Issue in a Personal Capacity Suit Have Occurred Cannot Even "Affect" an Officer's Immunity From Suit Under *Harlow v. Fitzgerald* and its Progeny.

As this Court has emphasized on numerous occasions since announcing its objective test for eliminating personal capacity damage claims in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the rule of qualified officer's immunity is a "protective" one that " 'provides ample support to all but the plainly incompetent or those who knowingly violate the law.' " *Burns v. Reed*, 111 S. Ct. 1934, 1944 (1991) (quoting *Malley v. Briggs*, 475 U.S. 334, 341 (1986)). Moreover, a federal plaintiff may not pierce qualified immunity merely by showing that a state officer violated state law or policy: "violation of a clear statute or regulation, although not the basis of suit," cannot become a ground on which to "deprive the official of qualified immunity from damages for violation of . . . constitutional provisions." *Davis v. Scherer*, 468 U.S. 183, 193 (1984). For a personal capacity suit to survive a plea for summary judgment based on qualified immunity, there must be shown sufficient proof of a violation of "clearly

established" "*American* law." *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (emphasis added).

That a federal constitutional right is "clearly established" in an "abstract" sense is also not enough. *Id.* at 639. It bears emphasis "that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. "*Harlow* teaches that officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted," and "hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). The "decisive fact is not that [a defendant's] position turned out to be incorrect, but that the question was open at the time he acted." *Id.* Where there is a "legitimate question" over the scope of a federal right, there can be no personal capacity liability. *Id.* at 535 n.12; *see also Anderson*, 483 U.S. at 640 (same). The issue is not merely whether the officer acted in a general manner "reasonably"; rather it is "whether the actions [alleged or which the summary judgment record evidences] are actions that a reasonable officer could have believed lawful" under federal law. *Id.* at 646 n.6. Thus, while immunity must be granted where the record fails to disclose violation of a federal right "at all," *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991); *Harlow* "assume[s], arguendo, that [the officer] erred in concluding that [compliance with federal law] existed." *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991); *cf. Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399 (1990) (Fed. R. Civ. P. 11 immunity if claim is " 'warranted by existing law or a good faith argument' for changing the law").

In holding that any decision of this Court handed down after March 26, 1988, "does not affect our determination" "for purposes of Shimoda's qualified immunity," the panel decision undercuts each and every one of these guiding principles, and, indeed, turns the rule of qualified immunity on its head. Instead of allowing officials to test the waters of state action through conduct that rests on legal principles that at least raise a "legitimate question" under the facts at hand, as measured by *this Court's precedents*, the Ninth Circuit's ruling in this case traps Petitioner into the time warp of "law-of-the-circuit" at the time the alleged actions or omissions occurred.

Although it is true that this Court in *Anderson v. Creighton* observed that immunity does not exist if "the unlawfulness" is "apparent" "in light of preexisting law," the Ninth Circuit wrongly interpreted this statement as freezing "preexisting law" at the court of appeals level at the time Petitioner acted. In so doing, the Ninth Circuit cut off Petitioner's qualified immunity argument at the knees, foreclosing any argument about the ramifications under *Harlow* of *Hudson v. McMillian*, 113 S. Ct. 995 (1993), *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), *FDIC v. Mallen*, 496 U.S. 230 (1988), or, more importantly, the conflicts which engendered those decisions. As the law of the case, the Ninth Circuit's mandate will also preclude discussion of *Helling v. McKinney*, 113 S. Ct. 2475 (1993), or this Court's forthcoming decision in *Farmer v. Brennan*, No. 92-7247 (U.S. cert. granted Oct. 4, 1993), or the conflicts which have engendered the grants of review there, in any proceedings on remand in the trial court.

Such a foreclosure of argument is completely unprecedented and not only makes nonsense of immunity doctrine generally, but defies the rule that "a precedent of this Court must be followed by the lower federal courts."

Hutto v. Davis, 454 U.S. 370, 375 (1982) (per curiam). Indeed, in *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), this Court held that a preliminary inquiry in every collateral order appeal from a denial of qualified immunity is whether the summary judgment record evidences a violation of the Constitution "at all." *Id.* at 1793. Whether there is such a violation must, at least in the first instance, be tested, as stated in *Hutto*, by the "precedent[s] of this Court." Likewise, whether "a question is open," *Mitchell*, 472 U.S. at 535, must logically be tested by the "precedent[s] of this Court," for it is those precedents, in the grant of certiorari itself, that signify the presence of inter-circuit conflict, conflict with or among decisions of the highest state courts, or presence of an "important question of federal law which has not been, but should be, settled by this Court." S. Ct. R. 10.1.

The Ninth Circuit's anomalous rule of preclusion in this case completely undermines the prudential goals of the immunity doctrine. *Harlow* immunity exists, after all, because a less protective rule "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," "depriv[ing] this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (Rehnquist, J., for a unanimous Court) (rejecting nonmutual collateral estoppel in cases against the Government). The Ninth Circuit's rule also significantly erodes the process of seeking immediate *en banc* review, *see* Fed. R. App. p. 35, by making inter-circuit conflict essentially irrelevant to immunity law.

As the Ninth Circuit has previously recognized:

> The circuits disagree as to whether inter-circuit conflict on a point of law negates the clearly established nature of a right. The Tenth

> Circuit has stated that the presence of a conflict "is relevant to the Harlow inquiry, but not controlling." *Garcia by Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988); *see also People of Three Mile Island v. Nuclear Regulatory Comm'rs*, 747 F.2d 139, 144 (3d Cir. 1984) (noting the ambiguous state of the law on the effect of a conflict). The Seventh Circuit, on the other hand, appears to follow the rule that if there is a conflict among the circuits, the law will not be clearly established until there is a definitive resolution of the conflict by the Supreme Court. *Benson v. Allphin*, 786 F.2d 268, 275 n.16 (7th Cir.), *cert. denied*, 470 U.S. 848 (1986).

Lum v. Jensen, 876 F.2d 1385, 1389 (9th Cir. 1989), *cert. denied*, 493 U.S. 1057 (1990). In this case, the Ninth Circuit took this conflict into heretofore unrecognized territory by holding not only that a conflict in the circuits, which this Court itself has recognized, but also that a new rule of law, announced upon this Court's resolution of the conflict that would dictate judgment on *the merits*, or be material to the qualified immunity analysis, cannot even be considered because only "preexisting" *circuit* "law" is relevant to immunity. In this case, for example, the Ninth Circuit's interpretation of *Creighton's* "preexisting law" statement utterly precluded Mr. Shimoda from arguing that qualified immunity existed because at least in the Sixth Circuit, until this Court held otherwise in *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), even conditions of confinement that presented immediate health risks had to be evaluated under the actual "malice" standard. Likewise, the Ninth Circuit prohibited Petitioner from making any appeal to the principles of *Hudson v. McMillian*, 112 S. Ct. 995 (1992), which held that all uses of force in the prison context had to be assessed under the "malicious and sadistic" test from *Whitley v. Albers*, 112 S. Ct. 995, 999

(1992), and which observed, *id.* at 1001, that several courts of appeals had held that an "isolated and unauthorized" attack by a single guard did not raise an issue under the Eight Amendment at all. Because the Ninth Circuit's understanding of *Creighton* is completely at odds with the principles and policies of the immunity doctrine, and is in clear conflict with the methodology of *Siegert v. Gilley,* the factors that warrant certiorari are compellingly present here.

Because the Ninth Circuit did not apparently consider, and could not have been presented, in Petitioner's petition for rehearing, filed March 31, 1993, with this Court's June 18, 1993, decision in *Harper v. Virginia Department of Taxation,* 113 S. Ct. 2510 (1993), the Court may wish, before summarily reversing the judgment or granting plenary review, to grant the petition, vacate, and remand for further consideration in light of *Harper.* There, a majority of the Court for the first time clarified that "a rule of federal law, once announced and applied to the parties to the controversy, must be given *full* retroactive effect by all courts adjudicating federal law." *Id.* at 2517 (emphasis added). *Seiter, Hudson, Mallen,* at well as *Helling v. McKinney,* 113 S. Ct. 2475 (1993), which also bears on the qualified immunity issue here, as well as *Farmer v. Brennan,* No. 92-7247, which this Court will decide shortly, are all cases where this Court has, or likely will, apply a rule of law to the parties in the case, and, as such, are amenable to *Harper's* full force.

Harper thus dictates reversal, or, at least, is "sufficiently analogous and, perhaps, decisive to compel reexamination of the case." *Henry v. Rock Hill,* 376 U.S. 776, 777 (1964) (per curiam). For these reasons, a writ should issue.

II. The Court Should Grant Review To Correct the Ninth Circuit's Unprecedent Expansion of the Eighth and Fourteenth Amendment as a Vehicle for Reviewing the Decision of High Level Prison Administrators on Matters Relating to the Segregation of Employees Charged With Misconduct Against Prisoners, an Issue on which the Courts of Appeals are Divided, and on Which the Court Below Has Departed from this Court's Teachings.

Wholly apart from its refusal to even consider Petitioner's main arguments why he did not violate "clearly established law" as this Court has defined it, the Ninth Circuit fundamentally departed from this Court's precedents in concluding that "issues of fact must be resolved in order to determine whether Shimoda 'knowingly violated the law' by failing to take [additional] steps to prevent Kauhane from repeating his physical attacks on inmates." Pet. App. A5. Like other instances where the Ninth Circuit has wrongly viewed a summary judgment record in the context of prison administration, *see Whitley v. Albers*, 475 U.S. 318 (1986), or on matters of qualified immunity, *see Hunter v. Bryant*, 112 S. Ct. 534 (1991), this assessment of the proof is wholly unsupported in the light generated by "the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). It should be reversed.

The Ninth Circuit's departure from this Court's flexibility in dealing with matters of prison administration as a matter of Eighth and Fourteenth Amendment analysis is extraordinary in this context, where Mr. Shimoda's only duty was to show that his actions were not "plainly incompetent," and did not "knowingly" violate the law. *Malley, supra*, 475 U.S. at 341. In this regard, it is important to stress what it is undisputed that Mr. Shimoda did.

First, Mr. Shimoda executed extensive procedures proscribing "excessive force," defining the conditions in

which force could and could not be used, defining what kinds of force could be used under particular situations, assigning responsibilities for enforcement of the standards, and for the reporting and review of incidents in which force was used. Pet. App. 50-60.

Second, Mr. Shimoda established a "practice" whereby those guards accused of physical misconduct were put into "no-contact" positions. In this case, Kauhane was clearly ordered into such a position, and was expressly forbidden from working on Saturdays or Sundays (days when staffing needs are more pressing, and it is more likely that a guard will "contact" inmates).

Third, acting under this policy, Mr. Shimoda's subordinates conducted a prompt preliminary investigation of the February 27, 1987, Kalilikane incident, which resulted in a May, 1987, referral to the Department's internal affairs office.

Fourth, when Kauhane became involved in another incident, on September 8, 1987, Shimoda bypassed the internal affairs office, and assigned the case to his own administrative staff.

Fifth, when the Randle incident investigation was not complete on March 14, 1988, Shimoda sent a memorandum to his staff officer, Lieutenant Asher, criticizing the delay, and demanding a report by March 22, 1988, four days before Burgo was struck.

It is also noteworthy that, other than the two incidents in question, Kauhane's record appeared to be clean. Moreover, while Kalilikane made extremely strong charges, nothing in the record indicates that what Kalilikane says occurred did in fact happen, other than Kalilikane's statements. In addition, the Randle incident, which supposedly put Administrator Shimoda on higher notice, involved only what was, according to Correctional Officer Stephen Adams, "a scuffle," in which "inmate

Randle and Sgt. Kauhane [were] holding each other by the arms, and talking aloud." Pet. App. A70. No injuries were reported in connection with the Randle incident. *See id.* Thus, by the time of the Burgo attack, Kauhane had completed more than a year of employment without inflicting even any alleged serious injury on an inmate.

As the Court stressed in *Helling v. McKinney*, 113 S. Ct. 2475 (1993), for a prison condition that poses future risk to an inmate to be considered violative of the Eighth Amendment, "the risk that the prisoner complains of" must be "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Id.* at 2482. Here, it would not have been "plainly incompetent" for Mr. Shimoda to believe that the exposure to ACO Kauhane violated this standard. Indeed, after ACO Kauhane had been caught violating the no-inmate contact order, but, on the record, without inflicting serious injury, Shimoda could well believe that Kauhane would see that the future risk of his losing his job would deter him from any contact with inmates, and, a fortiori, from breaking Burgo's jaw.

Indeed, the Ninth Circuit's rejection of the "malicious and sadistic" test from *Hudson v. McMillian*, 112 S. Ct. 995 (1992), as a benchmark for evaluating Shimoda's qualified immunity simply degrades the value of this Court's precedents. Certainly as a matter of logic it is not "incompetent" to believe that Mr. Shimoda should be held to no higher standard than his subordinate; indeed, to hold otherwise turns this Court's established holding that § 1983 does not create "respondeat superior" liability, *see Monell v. Department of Social Services*, 438 U.S. 658 (1978), on its head. Indeed, until this Court held otherwise, the Sixth Circuit had employed the *Whitley* "malicious and sadistic" test to contemporaneous challenges to prison conditions. *See Wilson v. Seiter*, 111 S. Ct. 2321, 2328

(1991). In *Hudson* itself, this Court even went so far as to note that it remains an open question whether "isolated and unauthorized" attacks by a lone prison guard are completely beyond the reach of the Eighth Amendment. Surely it was open to argument that the same authorities that give rise to this continued debate in the courts of appeals gave Mr. Shimoda basis not to take "more steps" than he did. *See Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973); *George v. Evans*, 633 F.2d 413, 416 (5th Cir. 1980), *cited, Hudson v. McMillian*, 112 S. Ct. at 1001. This Court's determination to "take no position on respondents' legal argument," *id.*, constitutes a determined deferral of the issue, and plainly requires granting Mr. Shimoda qualified immunity.

Moreover, if there were any doubt about the merits of Mr. Shimoda's entitlement to qualified immunity at the summary judgment stage, it should be alleviated by this Court's granting of review in *Farmer v. Brennan*, No. 92-7247 (U.S. cert. granted Oct. 4, 1993). That grant of review *itself* demonstrates that it remains an open question whether a senior prison administrator who lacks "actual knowledge" of "a threat to Plaintiff's safety," may, in light of Eighth Amendment mandates, refuse to act to protect a prisoner (there a pre-operative transsexual) by segregating him from other prisoners. *See* Pet. App. 6a, No. 92-7247. As this Court emphasized in *Wilson v. Seiter*, the standard of "wantonness" that governs Eighth Amendment litigation "does not have a fixed meaning but must be determined with 'due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.' " 111 S. Ct. at 2326 (quoting *Whitley*, 475 U.S. at 320). The precise determination of what "wantonness" requires is undoubtedly material to the yet unanswered issue in *Farmer*, particularly insofar as this Court has given prison administrators the widest latitude in making housing decisions in

the Nation's prisons. *See, e.g., Hewitt v. Helms*, 459 U.S. 460, 474 (1983) (in that context "the administrators must predict not just one inmate's future actions, as in parole, but those of an entire institution"). Here, the very grant of review in *Farmer* indicates that the questions in this case, laden with the Due Process implications of summary suspension or the sensitivities raised by federally-imposed "speedy investigation" mandates, *cf. City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), remain "open," *see Mitchell v. Forsyth*, 472 U.S. at 335, and hence that the judgment below denying immunity is plainly erroneous. In fact, even today, legitimate arguments can be made that the summary suspension of a prison guard, merely based upon an inmate's unconfirmed allegation, does not grant the same level of procedural protection provided in other cases of summary suspensions that this Court upheld (after the events at issue here occurred) in *FDIC v. Mallen*, 486 U.S. 230 (1988) (upholding 90-day delay in post-suspension hearing where probable cause determination was made through the neutral agency of the Grand Jury).

Indeed, the Ninth Circuit's decision denying immunity here evades even that nationally-applicable precedent available to Mr. Shimoda when he was called on to act in this case. In *Davidson v. Cannon*, 474 U.S. 344 (1986), this Court upheld a directed verdict upon the claim of an inmate who was threatened by a fellow inmate with physical harm, and sent a note reporting the threat to the prison's assistant superintendent, who read the note and sent it to the prison's correction sergeant. The latter, although aware of the note's contents, simply left it on his desk unread, and later forgot about it. The Court held that the lack of care in that case "simply [did] not approach the sort of abusive government conduct that the

due process clause was designed to prevent." 474 U.S. at 347-48.

As the Fourth Circuit has held in a similar circumstance:

> In our opinion, Ruefly has not sufficiently alleged that the defendants acted in deliberate indifference to a specific known risk of harm in failing to protect him from the assault by Scottie Lowe. At most, the amended complaint alleges that the defendants generally knew Lowe to be a violent person. It is not alleged, however, that the defendants knew or had reason to know that Lowe posed a specific risk of harm to Ruefly. There is no allegation in the amended complaint that Lowe had ever assaulted or threatened Ruefly prior to the incident on which this suit is based. In the absence of any such specific known risk of harm to Ruefly, we cannot say that the defendants violated the eighth amendment by failing to take precautions for Ruefly's safety.

Ruefly v. Landon, 825 F.2d 792, 794 (4th Cir. 1987); *see also Marsh v. Arn*, 937 F.2d 1056, 1061 (6th Cir. 1991) (applying the "specific risk" test to merits of an Eighth Amendment claim); *McGill v. Duckworth*, 944 F.2d 344, 349 (7th Cir. 1991) (same), *cert. denied*, 112 S.Ct. 1265 (1992).

While the writ in *Farmer v. Brennan, supra*, reflects the conflict on the merits of Burgo's underlying claim, thus dictating immunity, this Court may wish to hold this case pending the disposition in *Farmer*, or the disposition in *Elder v. Holloway*, No. 92-8579 (U.S. cert. granted June 28, 1993), in which the scope of the qualified immunity doctrine is a potential ground of decision. *See* the Brief Amicus Curiae of the States of Hawaii, et al. at 4-14, in *Elder*, No. 92-8579. In any event, it is clear that the Ninth Circuit gravely erred in denying qualified immunity to

Petitioner Shimoda. Because that error threatens unprecedented liability for senior prison administrators facing the most difficult of management decisions, the Court should grant the writ of certiorari in this case.

CONCLUSION

Because the court of appeals did not consider, and could not have been presented in Petitioner's petition for rehearing, the decisions of this Court in *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993), and *Helling v. McKinney*, 113 S. Ct. 2475 (1993), the Court may wish to grant the petition, and vacate and remand for further review in light of *Harper* and/or *Helling*. The Court may also wish to hold this case pending *Farmer v. Brennan*, No. 92-7247, and/or *Elder v. Holloway*, No. 92-8579. In any case, the Court should grant the writ.

Dated: Honolulu, Hawaii, November 16, 1993.

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APPENDIX "A"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD S. BURGO, Plaintiff-Appellee, v. EDWIN T. SHIMODA, Defendant-Appellant.	No. 92-16352 D.C. No. CV-91-00163-HMF MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, Chief District Judge, Presiding

Submitted March 10, 1993
Memorandum Filed March 17, 1993
Memorandum Withdrawn August 18, 1993

(Filed Aug. 18, 1993)

Before: WALLACE, Chief Judge, FARRIS and BRUNETTI, Circuit Judges.

Edwin T. Shimoda, Administrator of the Oahu Community Correctional Center, appeals the District court's denial of his summary judgment motion based on qualified immunity in an action under 42 U.S.C. § 1983 brought by Ronald S. Burgo, a Hawaii State prisoner. We have jurisdiction to review an appeal of the denial of a

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

summary judgment motion on the ground of qualified immunity. *Mitchell v. Forsythe*, 472 U.S. 511, 530 (1985). We affirm.

We review de novo the district court's denial of the defense of qualified immunity. *Lum v. Jensen*, 876 F.2d 1385, 1386 (9th Cir.), *cert. denied*, 493 U.S. 1057 (1990).

Burgo alleged that his eighth amendment right not to be subjected to cruel and unusual punishment was violated when Sergeant Supervisor Melvin Kauhane physically attacked him, breaking his jaw and causing other injuries. It is undisputed that the attack was unprovoked. Sergeant Kauhane had previously assaulted two other inmates. The district court denied Administrator Shimoda's summary judgment motion as premature, without prejudice to his reasserting qualified immunity as a defense, on the ground that there were disputed issues of fact about whether Shimoda knowingly failed to take steps to avert further assaults on inmates by Kauhane, thereby displaying deliberate indifference to Burgo's eighth amendment rights.

Shimoda contends that the district court erred in denying his motion for summary judgment because (1) the law governing his conduct as Administrator of the prison was not clearly established; and (2) even if the district court had correctly ruled that Shimoda could be liable if he had been "deliberately indifferent" to the danger of Kauhane assaulting prisoners, Shimoda had not shown "deliberate indifference."

Qualified immunity protects government officials who perform discretionary functions from liability for

damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and "could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987), To determine whether an official is entitled to qualified immunity, a court must determine (1) whether the right allegedly violated was "clearly established" at the time of the alleged violation, and (2) whether, in light of that law, a reasonable official could have believed his conduct to be lawful. *Act Up!/Portland v. Bagley*, No. 35888, slip op. 1071, 1076-77 (9th Cir. Feb. 10, 1993). The officer should prevail if the right asserted by the plaintiff was not "clearly established" or if the officer could have reasonably believed that his conduct was lawful. *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). Officials are charged with knowledge of relevant law in existence at the time of the alleged violative conduct. *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1075 (1989). Ordinarily, the district court should resolve the question of qualified immunity before trial, *Hunter v. Bryant*, 112 S.Ct. 534, 536-37 (1991), but if "a genuine issue of fact prevents a determination of qualified immunity at summary judgment, the case must proceed to trial." *Act Up!*, No. 90-35888, slip op. at 1079.

Shimoda disputes the district court's conclusion that it was clearly established "that a violation of the constitution would occur if a prison official who was in a position to take steps to avert an assault failed to do so intentionally or with deliberate indifference." At the time of the assault, in March 1988, it was clearly established that

the use of excessive force against prisoners by prison personnel violated prisoners' eighth amendment rights. *See McRorie v. Shimoda*, 795 F.2d 780, 783-84 (9th Cir. 1986). It was also clear that prison officials would be liable in their personal capacities under section 1983 if their conduct caused the violation. *Id.* (citing *Kentucky v. Graham*, 473 U.S. 159 (1985)). Prisoners could state a claim against prison personnel under 42 U.S.C. § 1983 "by establishing that prison personnel acted with 'deliberate indifference' in creating the condition that violates the eighth amendment." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citing *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) and *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986)).

Shimoda contends, however, that the "deliberate indifference" standard set forth in *Leer*, 844 F.2d 628, and *Berg*, 794 F.2d 457, is inapplicable because those cases involved attacks on inmates by other inmates, not attacks on prisoners by prison personnel. *Leer* made no such distinction, however, and when *Leer* was decided, we had previously held that prison officials would be personally liable under section 1983 for a deprivation of a prisoner's eighth amendment rights resulting from an assault by a prison guard if the officials' conduct "caused the deprivation." *McRorie*, 795 F.2d at 783 (citing *Kentucky v. Graham*, 473 U.S. at 166). Accordingly, the district court correctly determined that Burgo's right not to be subjected to excessive force by prison personnel was clearly established, as was the responsibility of supervisory prison

personnel not to act with deliberate indifference to that right. *Leer*, 844 F.2d 628, 633.[1]

Shimoda also contends that even if "deliberate indifference" is the applicable standard, he was not deliberately indifferent to Burgo's rights because he did not know that Kauhane was having contact with inmates at the time of the attack on Burgo, and that it was not his direct responsibility to enforce the "no contact" order that issued after the first reported assault. Burgo contends, however, that Shimoda did know that Kauhane was in contact with inmates in violation of the order because a second assault by Kauhane on an inmate was reported while Kauhane was under the no-contact order, and Shimoda ordered an investigation into that incident. The parties also disagree about whether Shimoda is responsible for lengthy delays in investigating Kauhane's two previous assaults on inmates and in taking disciplinary action. Because these issues of fact must be resolved in order to determine whether Shimoda "knowingly violated the law" by failing to take steps to prevent Kauhane from repeating his physical attacks on inmates, the district court did not err in denying summary judgment. *See*

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[1] Shimoda contends that the Supreme Court's recent decision in *Hudson v. McMillian*, 112 S. Ct. 995 (1992) requires that Burgo prove that Shimoda acted "maliciously or sadistically" rather than with "deliberate indifference" to Burgo's rights. This decision does not affect our determination of whether Burgo had a clearly established right at the time of the alleged violation, for purposes of Shimoda's claim of qualified immunity. See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("[I]n the light of preexisting law the unlawfulness must be apparent."); *Tribble*, 860 F.2d at 324.

Hunter v. Bryant, 112 S.Ct. 534, 537; *Act Up!*, slip op. at 1079.

AFFIRMED.

APPENDIX "B"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD S. BURGO, Plaintiff-Appellee, v. EDWIN T. SHIMODA, Defendant-Appellant.	No. 92-16352 D.C. No. CV-91-00163-HMF MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, Chief District Judge, Presiding

Submitted March 10, 1993**

(Filed Mar 17 1993)

Before: WALLACE, Chief Judge, FARRIS and BRUNETTI, Circuit Judges.

Edwin T. Shimoda, Administrator of the Oahu Community Correctional Center, appeals the district court's denial of his summary judgment motion based on qualified immunity in an action under 42 U.S.C. § 1983

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** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Therefore, Shimoda's request for oral argument is denied.

brought by Ronald S. Burgo, a Hawaii state prisoner. We have jurisdiction to review an appeal of the denial of a summary judgment motion on the ground of qualified immunity. *Mitchell v. Forsythe*, 472 U.S. 511, 530 (1985). We affirm.

We review de novo the district court's denial of the defense of qualified immunity. *Lum v. Jensen*, 876 F.2d 1385, 1386 (9th Cir.), *cert. denied*, 493 U.S. 1057 (1990). We determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Hamilton v. Endell*, 981 F.2d 1062 (9th Cir. 1992).

Burgo alleged that his eighth amendment right not to be subjected to cruel and unusual punishment was violated when Sergeant Supervisor Melvin Kauhane physically attacked him, breaking his jaw and causing other injuries. It is undisputed that the attack was unprovoked. Sergeant Kauhane had previously assaulted two other inmates. The district court denied Administrator Shimoda's summary judgment motion as premature, without prejudice to his reasserting qualified immunity as a defense, on the ground that there were disputed issues of fact about whether Shimoda's failure to prevent the assault on Burgo constituted deliberate indifference to Burgo's rights.

Shimoda contends that the district court erred in denying his motion for summary judgment because (1) the law governing his conduct as Administrator of the prison was not clearly established; and (2) even if the district court had correctly ruled that Shimoda could be

liable if he had been "deliberately indifferent" to the danger of Kauhane assaulting prisoners, Shimoda had not shown "deliberate indifference."

Qualified immunity protects government officials who perform discretionary functions from liability for damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Hamilton*, 981 F.2d at 1066. To determine whether an official is entitled to qualified immunity, a court must (1) identify the right allegedly violated; (2) determine whether that right was "clearly established" at the time of the alleged violation; and (3) determine whether, in light of that law, a reasonable official would have believed his conduct to be lawful. *Hamilton*, 981 F.2d at 1066; *see also Act Up!/Portland v. Bagley*, No. 90-35888, slip op. 1071, 1076-77 (9th Cir. Feb. 10, 1993). The officer should prevail if the right asserted by the plaintiff was not "clearly established" or if the officer could have reasonably believed that his conduct was lawful. *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). Officials are charged with knowledge of relevant law in existence at the time of the alleged violative conduct. *Tribble v. Gardner*, 860 F.2d 321, 324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1075 (1989).

Shimoda disputes the district court's conclusion that it was clearly established "that a violation of the constitution would occur if a prison official who was in a position to take steps to avert an assault failed to do so intentionally or with deliberate indifference." At the time of the assault, in March 1988, it was clearly established that the use of excessive force against prisoners by prison

personnel violated prisoners' eighth amendment rights. *See McRorie v. Shimoda*, 795 F.2d 780, 783-84 (9th Cir. 1986). It was also clear that prison officials would be liable in their personal capacities under section 1983 if their conduct caused the violation. *Id.* (citing *Kentucky v. Graham*, 473 U.S. 159 (1985)). Prisoners could state a claim against prison personnel under 42 U.S.C. § 1983 "by establishing that prison personnel acted with 'deliberate indifference' in creating the condition that violates the eighth amendment." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citing *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) and *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986)).

Shimoda contends, however, that the "deliberate indifference" standard set forth in *Leer*, 844 F.2d 628, and *Berg*, 794 F.2d 457, is inapplicable because those cases involved attacks on inmates by other inmates, not attacks on prisoners by prison personnel. *Leer* made no such distinction, however, and when *Leer* was decided, we had previously held that prison officials would be personally liable under section 1983 for a deprivation of a prisoner's eighth amendment rights resulting from an assault by a prison guard if the officials' conduct "caused the deprivation." *McRorie*, 795 F.2d at 783 (citing *Kentucky v. Graham*, 473 U.S. at 166). Accordingly, the district court correctly determined that Burgo's right not to be subjected to excessive force by prison personnel was clearly established, as was the responsibility of supervisory prison

personnel not to act with deliberate indifference to that right. *Leer*, 844 F.2d 628, 633.[1]

Shimoda also contends that even if "deliberate indifference" is the applicable standard, he was not deliberately indifferent to Burgo's rights because he did not know that Kauhane was having contact with inmates at the time of the attack on Burgo, and that it was not his direct responsibility to enforce the "no contact" order that issued after the first reported assault. Burgo contends, however, that Shimoda did know that Kauhane was in contact with inmates in violation of the order because a second assault by Kauhane on an inmate was reported while Kauhane was under the no-contact order, and Shimoda ordered an investigation into that incident. The parties also disagree about whether Shimoda is responsible for lengthy delays in investigating Kauhane's two previous assaults on inmates and in taking disciplinary action. Because these disputed issues of fact must be resolved in order to determine whether Shimoda was deliberately indifferent to the danger of Kauhane repeating his attacks on inmates, the district court did not err in

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[1] Shimoda contends that the Supreme Court's recent decision in *Hudson v. McMillian*, 112 S. Ct. 995 (1992) requires that Burgo prove that Shimoda acted "maliciously or sadistically" rather than with "deliberate indifference" to Burgo's rights. This decision does not affect our determination of whether Burgo had a clearly established right at the time of the alleged violation, for purposes of Shimoda's claim of qualified immunity. See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("[I]n the light of preexisting law the unlawfulness must be apparent."); *Tribble*, 860 F.2d at 324.

denying summary judgment. *See Hamilton*, 981 F.2d 1062, 1067.

AFFIRMED.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

RONALD S. BURGO, Plaintiff, vs. HAROLD FALK, Director, Department of corrections; EDWIN T. SHIMODA, Administrator, Oahu Community Correctional Center; MELVIN KAUHANE, Sergeant, Oahu Community Correctional Center, Defendants.	)	Civil No. 91-00163 HMF

ORDER GRANTING AND PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Jul. 17, 1992)

INTRODUCTION

On July 6, 1992, the court held a hearing on a motion for summary judgment filed by defendants Falk and Shimoda on April 17, 1992. Plaintiff Burgo filed an opposition on June 18, 1992. Defendants filed a reply on June 25, 1992.

BACKGROUND

Plaintiff Burgo is an inmate at the Oahu Community Correctional Center ("OCCC"). On March 26, 1988, defendant Kauhane, then assigned as the Sergeant Supervisor of Burgo's holding unit, physically attacked Burgo, without provocation. As a result of the attack, Burgo suffered a broken jaw. Following this attack, Kauhane falsified his report of the incident and instructed a subordinate to do the same.

On March 22, 1991, Burgo filed a pro se complaint in this court. Thereafter, it was discovered that, at the time of the attack, defendant Kauhane was under investigation by the Department of Corrections for two prior allegations of inmate assault. The series of events is as follows:

On April 20, 1987, inmate Samuel Kalilikane filed a written complaint alleging that Kauhane had verbally and physically abused him on February 3, 1987. A preliminary investigation was conducted at OCCC and on May 12, 1987, the results were forwarded to the Department of Internal Affairs for a full investigation. On June 18, 1987, the Chief of Security for OCCC issued a memorandum stating that Kauhane was to be assigned to Second Watch Security and was to have no inmate contact until further notice.

On September 8, 1987, Kauhane allegedly assaulted another inmate, Eugene Randle. The case was assigned for investigation, but apparently no progress was made for several months. On March 14, 1988, defendant Shimoda sent a memorandum to the investigating officer ordering that the investigation be completed as soon as possible.

On March 26, 1988, shortly after this letter was sent, Kauhane assaulted plaintiff Burgo while apparently assigned to an inmate contact position.

On May 8, 1988, Lt. R. Asher concluded his investigation of the Randle case and recommended to defendant Shimoda that the case be referred to the disciplinary committee. On July 13, 1988, defendant Shimoda recommended that Kauhane be dismissed for the Randle assault.

On August 15, 1988, defendant Shimoda recommended that Kauhane be dismissed for the Burgo assault. Approximately one year and three months later, on November 14, 1989, defendant Falk notified Kauhane that he was dismissed as an Adult Corrections Officer as a result of the assault upon plaintiff Burgo, effective December 5, 1989. On April 23, 1990, defendant was rehired pursuant to a settlement agreement. Under this agreement, all reference to the above described infractions was removed from Kauhane's personnel file and he was given notice that "one more infraction of excessive use of force on an inmate" ~~would~~ result in dismissal.

Plaintiff brought the instant suit against three defendants: Kauhane, the corrections officer who physically assaulted plaintiff; Shimoda, the Branch Administrator of OCCC during the relevant time period; and Falk, the Director of Corrections during the relevant time period. Defendants Shimoda and Falk request summary judgment in their favor with respect to the monetary damages claims based upon several grounds, which are considered, in turn, below.

DISCUSSION

I. SOVEREIGN IMMUNITY.

Defendants Shimoda and Falk correctly argue that, to the extent they are being sued for monetary damages *in their official capacities,* such a claim is barred by sovereign immunity. However, plaintiff notes that he is suing defendants in their official capacities for declaratory and injunctive relief only and is suing them for damages in their individual capacity. Sovereign immunity will not operate to bar such a claim against defendants in their individual capacity.

II. INDIVIDUAL LIABILITY FOR MONEY DAMAGES, "DELIBERATE INDIFFERENCE".

Defendants next argue that plaintiff has simply not set forth sufficient facts to hold either Shimoda or Falk personally liable for plaintiff's injuries. It is not entirely clear what is required to hold a supervising prison official personally responsible for an injury in a case such as this, except that plaintiff must demonstrate that the prison official acted "with deliberate indifference" in creating a condition that violates the eighth amendment. *Leer v. Murphy,* 844 F.2d 628, 633 (9th Cir. 1988).

The standard for holding supervisory personnel liable for monetary damages is higher than that required to hold them liable for declaratory or injunctive relief. The prevailing law of this circuit was set forth in *Leer v. Murphy,* 844 F.2d 628, 633 (9th Cir. 1988). In *Leer,* the plaintiff had been stabbed by another inmate and had sued various prison officials:

In analyzing this relationship between deliberate indifference and the constitutional deprivation, we believe it is important to distinguish the causal connection required when a plaintiff seeks injunctive or declaratory relief as opposed to damages. When a prisoner seeks injunctive or declaratory relief against a myriad of prison personnel responsible for operating a prison, we focus on whether the combined acts or omissions of the state officials responsible for operating the state's penal system created living conditions that violate the eighth amendment. The approach undeniably focuses on the duties and responsibilities of each of the individual defendants whose acts or omissions are alleged to have caused the constitutional deprivation. However, the causal link between the deliberate indifference and the eighth amendment deprivation is broader and more generalized than when that same prisoner seeks damages for the harmful effects of such conditions.

When plaintiffs, such as the inmates, seek to hold an individual defendant personally liable for damages, the causation inquiry between the deliberate indifference and the eighth amendment deprivation must be more refined. We must focus on whether the individual defendant was in a position to take steps to avert the stabbing incident, but failed to do so intentionally or with deliberate indifference. In order to resolve this causation issue, we must take a very individualized approach which accounts for the duties, discretion, and means of each defendant. Especially when, as in this case, a prisoner seeks to hold a prison employee individually liable because another prisoner

> attacked him, the prisoner must establish individual fault. Sweeping conclusory allegations will not suffice to prevent summary judgment. The prisoner must set forth specific facts as to each individual defendant's deliberate indifference.

Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988) (citations omitted). The court in *Leer* then held, in summary judgment, that the high-ranking prison officials could not be held liable because the inmates failed to allege facts which sufficiently demonstrated that the deliberate indifference any particular official was the actual and proximate cause of any constitutional violation. *Id.* at 634.

Cases which have survived motions for summary judgment have generally involved situations where an official had some direct involvement in the incident. For example, in *Berg v. Kincheloe*, 794 F.2d 457, 460-61 (9th Cir. 1986), the court of appeals reversed a grant of summary judgment in favor of a prison official where the inmate had alleged specific facts showing that the official directly supervising the inmate knew of the threat to the inmate's safety, yet failed to take action.

Shimoda and Falk, by contrast, both high ranking prison officials, are not being charged with a specific act of indifference as was the case in *Berg*. Rather plaintiff's theory is that these defendants acted with deliberate indifference in failing to establish and properly implement internal policies and regulations. He further alleges that this deliberate indifference was the actual and proximate cause of his injuries. Because Shimoda and Falk stand in somewhat different positions, the facts relating to each will be considered in turn.

A. Shimoda.

Shimoda is the branch administrator of OCCC, the facility at which the assault occurred. In support of his claim of liability against Shimoda, plaintiff cites the following facts:

1) On April 20, 1987, inmate Kalilikane filed a written complaint alleging that Kauhane had verbally and physically abused him on February 3, 1987.

2) On June 18, 1987, defendant Shimoda, or one of his subordinates, issued a "no inmate contact" notice against Kauhane.

3) On September 8, 1987, Kauhane assaulted a second inmate, Randle.

4) On March 14, 1988, Shimoda sent a memorandum to the investigating officer ordering that the Randle investigation be completed as soon as possible.

5) On March 26, 1988, the date of the Burgo assault, Shimoda was "aware that two inmate complaints of excessive use of force by Sgt. Melvin Kauhane were under investigation." Declaration of Shimoda.

The court finds that these facts demonstrate at least a contested issue of fact as to whether Shimoda acted with "deliberate indifference" to Burgo's constitutional rights by failing to take additional steps to restrain defendant Kauhane. Shimoda knew that Kauhane was under investigation for one assault, and furthermore, his office had issued a "no inmate contact" letter. Kauhane was then charged with a second assault, which had apparently occurred while under a "no inmate contact" order. Clearly Shimoda should, at this point, have been alerted

to the possibility that his "no inmate contact" policy was not being properly implemented and that defendant Kauhane could remain a potential danger to other inmates unless the policy was properly enforced.

Given these facts and inferences drawn therefrom, the court finds that a disputed issue of material fact exists as to whether defendant Shimoda acted with deliberate indifference. Defendants, motion for summary judgment as to defendant Shimoda on this issue is, therefore, DENIED.

B. Falk.

The court notes that, in contrast to defendant Shimoda, plaintiff has presented no specific facts demonstrating that defendant Falk acted with deliberate indifference. Falk is the Director of the Department of Corrections, overall. Plaintiff has only presented general allegations as to Falk's duties and responsibilities. Liability is predicated not on any specific connection with plaintiff, but rather on a general failure to establish and implement policies. Although such allegations might suffice to support a claim for injunctive relief, the court finds that they are too attenuated and speculative to establish individual fault and proximate cause as required under *Leer*.

Accordingly, the court GRANTS defendants' motion for summary judgment as to plaintiff's claims for money damages against defendant Falk.

III. QUALIFIED IMMUNITY.

Because the court has granted summary judgment in favor of Falk on the substantive claim, it will reach the issue of qualified immunity only as it relates to the remaining claim against defendant Shimoda.

The scope of the doctrine of qualified immunity, as interpreted by this circuit, was set forth in *Tribble v. Gardner,* 860 F.2d 321, 324 (9th Cir. 1988):

> "[G]overnment officials performing discretionary functions[] generally are shielded from liability for civil damages [in a section 1983 action] insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.E.2d 396 (1982). The "clearly established law" test requires more than an alleged "violation of extremely abstract rights." *Anderson v. Creighton,* ___ U.S. ___, 107 S. Ct. 3034, 3038-39, 97 L.E.2d 523 (1987). Rather, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 3038. In other words, "in light of preexisting law the unlawfulness must be apparent." *Id.*
>
> To determine whether a right is clearly established, "in the absence of binding precedent, a court should look to all available decisional law including decisions of state courts, other circuits and district courts. . . . " *Ward v. County of San Diego,* 791 F.2d 1329, 1332 (9th Cir. 1986), *cert. denied,* ___ U.S. ___, 107 S. Ct. 3263, 97 L.E.2d 762 (1987). An additional factor that may be considered is "a determination of the likelihood that

> the Supreme Court or this circuit would have reached the same result as courts which had previously considered the issue." *Capoeman v. Reed*, 754 F.2d 1512, 1515 (9th Cir. 1985). Government officials are charged with knowledge of constitutional developments, including all available decisional law. *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1048 (9th Cir. 1988).

Under this standard, it was "clearly established law" that a violation of the constitution would occur if a prison official who was in a position to take steps to avert an assault failed to do so intentionally or with deliberate indifference. *See Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988).

The court has found that there is a disputed issue of material fact as to whether Shimoda falls into the above category. The question of whether Shimoda's conduct constituted deliberate indifference is a mixed question of fact and law. However, the underlying facts which will ultimately form the basis for deciding the legal issue are not yet certain. Accordingly, because the court does not know exactly what Shimoda did and what facts he knew at the time, it cannot say, at this point, whether he did or did not violate the "clearly established law" set forth above. The court will, therefore, DENY the motion to dismiss as premature. This ruling will not bar defendant Shimoda from reasserting the qualified immunity defense at a later time before either the court or the trier of fact.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JUL 17 1992

/s/ Harold M. Fong
UNITED STATES DISTRICT JUDGE

RONALD S. BURGO v. HAROLD FALK, Director, Department of corrections: EDWIN T. SHIMODA, Administrator, Oahu Community Correctional Center; MELVIN KAUHANE, Sergeant, Oahu Community Correctional Center; Civil No. 91-00163 HMF; ORDER GRANTING AND [sic] PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

APPENDIX "D"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD S. BURGO,	)	No. 92-16352
Plaintiff-Appellee,	)	D.C. No. CV-91-00163-HMF
v.	)	
EDWIN T. SHIMODA,	)	ORDER
Defendant-Appellant.	)	(Filed AUG 18 1993)

Before: WALLACE, Chief Judge, FARRIS, and BRUNETTI, Circuit Judges.

The memorandum disposition filed on March 17, 1993 is withdrawn. The attached memorandum disposition is ordered filed.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX "E"

JUDGMENT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 92-16352
CT/AG#: CV-91-00163-HMF

RONALD S. BURGO
Plaintiff - Appellee

v. (Filed Aug. 30, 1993)

EDWIN T. SHIMODA
Defendant - Appellant

APPEAL FROM the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered August 18, 1993

APPENDIX "F"

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RONALD S. BURGO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RONALD S. BURGO, Plaintiff, vs. HAROLD FALK, Director, Department of Corrections; EDWIN T. SHIMODA, Administrator, Oahu Community Correctional Center; MELVIN KAUHANE, Sergeant, Oahu Community Correctional Center, Defendants.	CIVIL NO. 91-00163 HMF PLAINTIFF BURGO'S SECOND AMENDED COMPLAINT FOR DAMAGES, INJUNCTION, AND DECLARATORY JUDGMENT; SUMMONS (Filed Feb. 26, 1992)

PLAINTIFF BURGO'S SECOND AMENDED COMPLAINT FOR DAMAGES, INJUNCTION, AND DECLARATORY JUDGMENT

Comes now RONALD S. BURGO, Plaintiff herein, by and through his attorneys, The Law Offices of Michael F. McCarthy, and for an amended complaint against the above-named Defendants alleges as follows:

PARTIES; JURISDICTION

1. The court has jurisdiction of this action under 28 U.S.C. § 1343; 28 U.S.C. § 1331; 28 U.S.C. § 1367; and the pendent jurisdiction of the court over state claims. Venue is proper in this jurisdiction pursuant to 28 U.S.C. § 1391(b).

2. Plaintiff, RONALD S. BURGO (hereinafter "Plaintiff BURGO"), is a citizen of the United States and a resident of the State of Hawaii. At all times pertinent hereto, Plaintiff BURGO was a prisoner within the penal system of the State of Hawaii. At the time of the violations alleged herein, Plaintiff BURGO was an inmate at the Oahu Community Correctional Center, Honolulu, Hawaii.

3. Defendant HAROLD FALK (hereinafter "Defendant FALK") is a resident of the State of Hawaii and is and always has been, at all times pertinent hereto, the Director of the Department of Corrections of the State of Hawaii. Defendant FALK is responsible for the administration, operation and supervision of state corrections institutions and facilities within the State of Hawaii, including the Oahu Community Correctional Center, and

for the promulgation and enforcement of rules, regulations, policies and practices relevant thereto. Defendant FALK is sued herein individually and in his official capacity.

4. Defendant EDWIN T. SHIMODA (hereinafter "Defendant SHIMODA") is a resident of the State of Hawaii and is and always has been, at all times pertinent hereto, the Administrator of the Oahu Community Correctional Center (hereinafter "OCCC"). Defendant SHIMODA is responsible for the administration, operation and supervision of OCCC staff and facilities, the custody and control of OCCC inmates, and for the promulgation and enforcement of rules, regulations, policies and practices relevant thereto. Defendant SHIMODA is sued herein individually and in his official capacity.

5. Defendant MELVIN KAUHANE (hereinafter "Defendant KAUHANE"), is a resident of the State of Hawaii and is and always has been, at all times pertinent hereto, a Sergeant and Adult Corrections Officer at OCCC. At the time of the civil rights violations alleged herein, Defendant KAUHANE was believed to have been the interim supervising Adult Corrections Officer at OCCC. Defendant KAUHANE is sued herein individually and in his official capacity.

FACTS

6. At all times relevant to this complaint, each individual Defendant was acting in the course and scope of his employment.

8. At all times relevant to this complaint, each Defendant was acting under color of state law.

9. On or about March 26, 1988, Plaintiff BURGO was an inmate within the Oahu Community Correctional Center, Honolulu, State of Hawaii, housed within cell number 7 of the facility holding unit.

10. On or about March 26, 1988, Plaintiff BURGO requested that Adult Corrections Officer (hereinafter "ACO") Moses give Plaintiff BURGO a grievance form. ACO Moses proceeded to open Plaintiff BURGO'S cell and Plaintiff BURGO observed Defendant KAUHANE motioning for Plaintiff BURGO to come to him.

11. Plaintiff BURGO approached Defendant KAUHANE as directed and spoke at all times in an attentive and non-threatening manner.

12. At the end of the conversation, Plaintiff BURGO turned around and was walking back to his cell when Plaintiff BURGO was struck, without notice or warning, from behind by Defendant KAUHANE. Defendant KAUHANE forcibly struck his fist upon the head, face, and jaw of Plaintiff BURGO, thereby fracturing Plaintiff BURGO'S jaw and causing serious and permanent injuries thereto. The impact and force of the repeated hits by Defendant KAUHANE knocked Plaintiff BURGO to his knees, rendering him helpless in a state of shock. Plaintiff BURGO was returned to his cell without immediate medical attention.

13. Approximately thirty minutes after the beating inflicted by Defendant KAUHANE, a nurse from the OCCC medical appeared to examine Plaintiff BURGO in

the holding unit. The nurse initially provided an ice pack to Plaintiff BURGO. Thereafter, Plaintiff BURGO was transferred to the medical unit within OCCC where he was examined by a Nurse Burns. Plaintiff is informed and believes and herein alleges that pictures were taken of Plaintiff BURGO while in the medical unit for examination. Thereafter, the decision was made to transport Plaintiff BURGO to Queen's Medical Center for emergency treatment.

14. Defendant KAUHANE appeared in the OCCC medical unit with ACO MUNDON. Plaintiff BURGO was removed from the OCCC medical unit by Defendant KAUHANE and ACO MUNDON and placed within the Module 5 restroom. Defendant KAUHANE requested ACO MUNDON leave the immediate area. While alone and in the immediate presence of Plaintiff BURGO, Defendant KAUHANE thereupon verbally threatened Plaintiff BURGO while making threatening gestures with a leg iron chain set. Plaintiff BURGO feared for his immediate bodily harm believing that Defendant KAUHANE was presently possessed of the capability to presently further injure Plaintiff BURGO. Plaintiff BURGO also feared future bodily harm from Defendant KAUHANE as a result of the verbal threats made to Plaintiff BURGO.

15. Thereafter, the leg iron chain set was applied to Plaintiff BURGO and ACO MUNDON transported Plaintiff BURGO to Queen's Medical Center for emergency medical treatment. Said treatment was rendered by Dr. George Wessburg at Queen's Medical Center.

16. As a result of the injuries inflicted upon Plaintiff BURGO under color of state law, Plaintiff BURGO has

suffered severe pain and suffering, permanent and lasting head, facial, and jaw injuries, emotional distress, fear for his life and well-being, violation of Plaintiff's civil rights, and unlawful deprivation of liberty.

FIRST CLAIM FOR RELIEF

(Eighth Amendment Claim Under § 1983)

17. Plaintiff incorporates in this paragraph the allegations of paragraphs 1-16.

18. Defendant KAUHANE maliciously and without any provocation or justification inflicted unnecessary, and unreasonable force upon Plaintiff BURGO on or about March 26, 1988, thereby causing severe physical pain, serious and permanent injuries, and mental and emotional distress to Plaintiff BURGO.

19. The excessive and unjustified force used against Plaintiff BURGO violated Plaintiff's eighth amendment right to be free from cruel and unusual punishment.

SECOND CAUSE OF ACTION

(Fourteenth Amendment Due Process Claim Under §1983)

20. Plaintiff incorporates in this paragraph the allegations of paragraphs 1-19).

21. Defendant KAUHANE intentionally or with reckless disregard deprived Plaintiff BURGO of his fourteenth amendment right to due process by subjecting Plaintiff BURGO to physical and mental abuse and causing Plaintiff BURGO serious and permanent injuries.

THIRD CAUSE OF ACTION

(Deliberate Indifference – Eighth and Fourteenth Amendment Claim Under §1983)

22. Plaintiff incorporates in this paragraph the allegations of paragraphs 1-21.

23. Defendants FALK and SHIMODA have the legal obligation to institute a policy, practice, custom or usage of applying only reasonable force, and only when justified, against prisoners at Oahu Community Correctional Center.

24. Defendants FALK and SHIMODA have the legal obligation to institute a policy, practice, custom or usage of hiring, retaining and entrusting Corrections Officers at Oahu Community Correctional Center who are fit to be in unsupervised contact with prisoners.

25. Defendants FALK and SHIMODA have the legal obligation to institute a policy, practice, custom or usage of adequately supervising the actions and inactions of Corrections Officers at Oahu Community Correctional Center such that prisoners are protected from unnecessary, unreasonable, unjustifiable, and excessive physical and mental force and acts.

26. Defendants FALK and SHIMODA have the legal obligation to institute a policy, practice, custom or usage which reasonably protects inmates from unnecessary, unreasonable, unjustifiable, and excessive physical and mental force and acts.

27. Defendants FALK and SHIMODA had received prior notice of Defendant KAUHANE'S pattern of using

unnecessary, unreasonable, unjustifiable and excessive force against prisoners.

28. Defendants FALK and SHIMODA demonstrated deliberate indifference and instituted or allowed to be instituted the practice, policy, custom or usage which allowed the use of unnecessary, unreasonable, unjustifiable and excessive force against prisoners at Oahu Community Correctional Center.

29. Such practice, policy, custom or usage proximately caused the deprivation of Plaintiff BURGO'S Eighth and Fourteenth Amendments rights and his physical and mental harm.

FOURTH CAUSE OF ACTION

(Assault and Battery – Pendent State Claim)

30. Plaintiff incorporates in this paragraph the allegations of paragraphs 1-29.

31 [sic] Defendant KAUHANE intentionally struck Plaintiff BURGO causing harmful and offensive contact and causing Plaintiff BURGO apprehension of harmful and offensive contact.

WHEREFORE Plaintiff BURGO prays for relief as follows:

(1) For compensatory damages in an amount to be proven at trial;

(2) That upon hearing, the Court issue a preliminary and permanent injunction enjoining Defendant KAUHANE from physically contacting Plaintiff BURGO.

(3) That upon hearing, the Court issue a preliminary and permanent injunction restraining Defendants, their agents, employees, successors in office, and all other persons in active concert and participation with them, from unnecessary, unreasonable, unjustified, and excessive physical attacks upon Plaintiff BURGO [sic]

(4) That the Court award punitive damages to Plaintiff.

(5) That the Defendants be required to pay the legal costs and expenses incurred herein by Plaintiff BURGO, including reasonable provision for Plaintiff's attorneys' fees.

(6) That the Court grant such further and additional relief that is appropriate herein.

DATED: Honolulu, Hawaii, FEB 26 1992.

/s/ Michael F. McCarthy
MICHAEL F. McCARTHY
MICHAEL D. FORMBY
Attorneys for Plaintiff
RONALD S. BURGO

APPENDIX "G"

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

RONALD S. BURGO, Plaintiff, vs. HAROLD FALK, et al., Defendants.	)	Civ. No. 91-163 HMF DECLARATION OF EDWIN SHIMODA

DECLARATION OF EDWIN SHIMODA

Comes now EDWIN SHIMODA, pursuant to 28 U.S.C. 1746 to state the following:

1. I am a Defendant herein. I am presently employed as Correctional Facilities Division Administrator for the Department of Public Safety, State of Hawaii. From 1981 through 1989 I was employed as the Branch Administrator of the Oahu Community Correctional Center.

2. On March 26, 1988, I was aware that two inmate complaints of excessive use of force by Sgt. Melvin Kauhane were under investigation. I received one complaint on April 20, 1987 which I forwarded to the Internal Affairs Division for investigation. When a complaint was made on or about September 8, 1987, I referred it to my facility investigator because Internal Affairs was taking so long on the other case. As a Branch Administrator I had no control over the length of time taken by Internal Affairs Division to investigate complaints.

3. Exhibit F is a true copy of a memorandum dated March 14, 1988, which I sent to the investigator of the September 8, 1987 incident, advising him that the investigation must be completed as soon as possible. The investigation was completed May 8, 1988 and the administrative review process was commenced immediately. The procedure was completed at the facility level with my July 13, 1988, recommendation to the Director that Kauhane be terminated from employment.

4. The use of force by facility staff against inmates was governed by department policy and procedure 493.08.05, and Oahu Community Correctional Center policy and procedure 7.08.05, a true copy of which is attached as Exhibit G hereto.

5. At all relevant times herein, it was the practice at OCCC to assign employees accused of excessive use of force against inmates, to posts involving no inmate contact pending investigation of the complaint, where appropriate in the discretion of the supervisor. Where an adult corrections officer was involved, the policy would be implemented by the Chief of Security, the supervisor responsible for the security staff.

6. Every three months, the Chief of Security assigns each ACO to a watch rotation. The Watch Captain would then assign every ACO to a post. These post assignments are approved by the Chief of Security. As Branch Administrator, I would not review or see the actual assignment sheets.

7. As far as I know, Sgt. Kauhane was assigned to a post with no inmate contact following the April 20, 1987 and September 8, 1987 complaints. Exhibit H is a true

copy of a memo dated June 18, 1987 from Fred Ragasa, Chief of Security, stating that Sgt. Kauhane is to have no inmate contact until further notice. I am not aware of any further notice countermanding this memo.

8. On March 26, 1988, I did not know that Sgt. Kauhane was working in contact with inmates. Had I known this, I would have directed his supervisor, the Chief of Security, to make sure that he was removed from inmate contact until the pending investigations were completed.

9. Exhibit I is a true copy of a memo dated April 27, 1988 from Fred Ragasa, Chief of Security, stating that Sgt. Kauhane is to have no inmate contact until further notice. I am not aware of any further notice countermanding this memo.

10. On completion of facility-level administrative review of the March 26, 1988 incident, on August 15, 1988 I recommended that Kauhane be terminated from employment. A letter of termination was issued to Kauhane by the Director on November 15, 1989, effective December 5, 1989.

11. The Internal Affairs investigation of the April 20, 1987 complaint was completed November 15, 1989. In view of the termination, no further action was taken regarding that complaint. Kauhane was subsequently reinstated by agreement dated April 23, 1990. This agreement disposed of all complaints against him. He is presently employed on a "last chance" basis; any future infraction of excessive force involving an inmate will result in dismissal. There have been no complaints against Kauhane since this ultimatum was issued.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 15, 1992.

/s/ Edwin Shimoda
EDWIN SHIMODA

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

RONALD S. BURGO, Plaintiff, vs. HAROLD FALK, et al., Defendants.	Civ. No. 91-163HMF DECLARATION OF FRED RAGASA.

DECLARATION OF FRED RAGASA

Comes now FRED RAGASA, pursuant to 28 U.S.C. 1746 to state the following:

1. I retired from employment with the State of Hawaii, Department of Public Safety on December 31, 1989. For the last 10 years of my employment I was the Chief of Security at the Oahu Community Correctional Center.

2. As Chief of Security I was the highest level supervisor of the security staff (Adult Correctional Officers) in the facility. Our policy and procedures regarding the use of force with inmates were in writing. All of the ACO's knew that they were not supposed to use excessive force with the inmates.

3. When a complaint was made that an ACO had used excessive force against an inmate, we would move the ACO to a non-inmate contact position until the investigation was over. Normally I would issue a memo telling the watch captains not to assign the man to a position

with inmate contact. The memo would stay in effect until rescinded by another memo from myself.

4. The security staff is assigned to various posts as follows. Every three or four months a new master schedule would be drawn up. I would assign each employee to a certain watch. The captain for each watch would then assign each person to a particular post, and forward the master schedule to me for final approval. The schedule would remain in effect for the entire period. If an ACO was "red-flagged" for no inmate contact, the watch captain and I would be aware of that and would assign him to a post such as Central Control. Central Control was about the only non-inmate contact post available for Sergeants. The master schedule is not reviewed by the Administrator or the Director.

5. I do not know how Kauhane came to be assigned to Special Holding on March 26, 1988. I do not recall anything about this incident. To the best of my recollection, I did not know that he was on inmate-contact duty that day. In March of 1988, if I had known that Kauhane was assigned to an inmate contact post, I would have ordered him moved to a non-inmate contact post.

6. If an ACO who is barred from inmate contact works overtime, another watch captain might inadvertently place him in an inmate contact slot, not realizing he was not supposed to be there. I did not review overtime assignments. A Sergeant (ACO IV) can be assigned to an ACO III post for overtime duty.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 16, 1992.

/s/ Fred Ragasa
FRED RAGASA

[EXHIBIT C]

DEPARTMENT OF CORRECTIONS

INTER-OFFICE MEMORANDUM

No.:___

Suspense:___

August 15, 1988

TO: Harold Falk, DIR

VIA: Thomas Hugo, CCDA

FROM: Edwin Shimoda, OCA

SUBJECT: ADMINISTRATIVE MEETING: ACO IV MELVIN KAUHANE

ACO IV Melvin Kauhane appeared before the Employees Administrative Meeting Committee, having been charged with Assault in the Third Degree and Physical Abuse. It was alleged that ACO IV Kauhane, without provocation, physically attacked inmate Ronald Burgo in the Holding Unit. The result of the attack is that inmate Burgo suffered a broken jaw.

Our investigation was thorough and complete and seems to validate that ACO IV Kauhane acted outside from his scope of employment. ACO IV Kauhane also instructed another ACO to write untrue facts in a report, and that ACO Kauhane's verbal statement to the Committee regarding nurse Tomi Bradley's response to the Holding Unit with an ice pack is inconsistent. Other inmate witnesses described what they saw (inmate Burgo being punched), or heard (heard punching and falling down).

A thorough review of the case was made and it appears that ACO IV Melvin Kauhane was given proper due process. He received notice, was permitted to review the evidence/reports, had proper representation and was given an opportunity to rebut the investigation and report.

I am accepting the Committee's finding of guilty to the charge of Physical Abuse. I am also recommending that ACO IV Melvin Kauhane be dismissed as an Adult Corrections Office as this is the second time this year he has been found guilty of assaulting an inmate.

/s/ Edwin T. Shimoda
OCA

cc: CCDA
DOC/PERS
CS
Employee file

[EXHIBIT D]

STATE OF HAWAII
DEPARTMENT OF CORRECTIONS
677 Ala Moana Boulevard, Suite 700
Honolulu, Hawaii 96813

NO. 89-3434

November 14, 1989

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Melvin Kauhane
P.O. Box 2577
Nanakuli, Hawaii 96792

Dear Mr. Kauhane:

This is to inform you that we are dismissing you from employment as an Adult Corrections Officer IV, Position No. 26238 (permanent appointment), with the Oahu Community Correctional Center (OCCC), Department of Corrections. The effective date of dismissal shall be the close of business Tuesday, December 5, 1989.

This action is being taken as a result of the following:

1. On March 26, 1988, at approximately 10:00 a.m., at OCCC in the Holding Unit, Cell #7, you, without provocation, physically attacked inmate Ronald S. Burgo, which resulted in Burgo sustaining a fractured jaw.

2. On March 26, 1988, you submitted a written report that stated in part, "As inmate R. Burgo tried to approach me, very fast, I reacted. Taking him down to a prone position using the spin take-down (taught in our

crisis intervention class). Leaving him there for a while to cool off."

You also asked ACO Moses Fonoimoana to include in his report of the incident that when he arrived he saw that you had the inmate restrained on the floor. His report stated, "I continued to collect the inmates' lunch plates when I suddenly heard a commotion in the front, and as I arrived, Sgt. Kauhane had the inmate on the ground in a restrained position." ACO Fonoimoana subsequently stated during the investigation that he included the statement quoted above in his report because you had asked him to do so. You, therefore, deliberately falsified your report and asked a subordinate to also submit a false report.

Considering the seriousness of your actions described above, we are dismissing you from employment in accordance with Title 14, Subtitle I, State of Hawaii Personnel Rules Section 14-15-4.

Should you wish to respond to any of the information contained herein, you may do so at 2:00 p.m. on Monday, November 27, 1989, at the office of Correctional Centers Division Administrator, located in the HonFed Bank Ala Moana Building, Suite 700, Honolulu, Hawaii. If you intend to exercise this opportunity to respond to the information provided above, please call Ms. Juliana Siu at 548-3662 by Friday, November 24, 1989, to confirm that you will be appearing on said date, time, and place as specified.

Regardless of whether you exercise the opportunity to respond to the charges provided above, you have the

right to process a grievance in accordance with the provisions of the Unit 10 Collective Bargaining Agreement.

Sincerely,

/s/ Harold Falk
Harold Falk
Director

PERS-LRU/FV:it
[doc #2479e]

c UPW
DPS-AAD
DPS-LRD
OCCC
CCDA
RSS-Ee's File

[EXHIBIT E]

STATE OF HAWAII
DEPARTMENT OF PERSONNEL SERVICES
850 Punchbowl Street
Honolulu, Hawaii 96813

APR 23, 1990

Mr. Mel Rodrigues
Business Agent
United Public Workers
1426 North School Street
Honolulu, Hawaii 96817

Dear Mr. Rodrigues:

This is our Step 3 response to the Unit 10 grievance filed on behalf of Mr. Melvin Kauhane, an Adult Corrections Officer IV (ACO), at the Oahu Community Correctional Center (OCCC), Department of Corrections (DOC).

The Union contends that Sections 11.01, 56.03, and 56.04 of the Unit 10 Agreement were violated when DOC dismissed the grievant on December 5, 1989. As a remedy, the Union is seeking to have the employer reinstate the grievant and rescind the action taken by DOC.

A meeting was held with Mel Rodrigues, Business Agent; Melvin Kauhane, the grievant; and Walter Harrington of my staff.

After further discussions with DOC, the grievant, and the Union, it was agreed that the grievance shall be settled in the following manner:

1. The grievant shall be suspended for a period of twenty-two working days for the charge

of unnecessary use of physical force on an inmate March 26, 1988.

2. The suspension shall be from November 5, 1989 up to and including December 5, 1989.

3. The grievant shall be compensated for straight time, (forty hour weeks) as though he had been working from December 6, 1989 until May 1, 1990 excluding any overtime and temporary assignments he may have received had he been physically working.

4. DOC shall remove from the grievant's personnel file any reference to alleged infractions which occurred on October 3, 1989 and November 6, 1989.

5. The grievant further agrees that one more infraction of excessive use of force on an inmate, after his return to duty shall result in his dismissal from DOC. This, however, does not preclude the grievant from exercising his right under the Bargaining Unit 10 Agreement.

6. The grievant acknowledges that he has been fairly represented by the Union in this settlement.

The parties agree that this is a settlement of the grievance and will sign in the appropriated spaces provided below.

Thank you for the extended time to investigate this matter.

Sincerely,
/s/ Alfred C. Lardizabal
ALFRED C. LARDIZABAL
Director

/s/ Melvin Kauhane
MELVIN KAUHANE
GRIEVANT

/s/ George Iranon
GEORGE IRANON
DIRECTOR
DEPARTMENT OF
CORRECTIONS

/s/ Gary Rodrigues
GARY RODRIGUES
STATE DIRECTOR
UNITED PUBLIC WORKERS

cc: DOC

[EXHIBIT F]

MEMORANDUM/ROUTE FORM

State of Hawaii
Department of Corrections

To: Lt. R. Asher

Date: 3/14/88

From: /s/ Edwin T. Shimoda

Subject: EUGENE RANDLE'S INVESTIGATION

[ ] Approval

[ ] Comments

[ ] Discussion

[ ] Information

[ ] Action

[ ] See me

[ ] Signature

[ ] Circulate

[ ] Return

[ ] File

REMARKS:

Six (6) months have lapsed since the [sic] Randle's incident. The investigation must be completed as soon as possible.

Attached are the incident reports for your referral.

Suspense Date: 03/22/88 (TUESDAY)

Attachments

cc: OCA, IPA, CS, DSA, File

DSSH 0614 (6/77)

[EXHIBIT G]

OAHU COMMUNITY
CORRECTIONAL CENTER

POLICY

EFFECTIVE DATE: DEC 19 1983

POLICY # 7.08.I1

CHAPTER 8: Security and Control

SUPERSEDES # ___
DATE:

SUBJECT: Use of Force

PAGE 1 OF 12

1.0 PURPOSE

To supplement Corrections Division directives regarding the use of force, for the guidance of Oahu Community Correctional Center (OCCC) personnel.

2.0 REFERENCES AND DEFINITIONS

2.1 References

a. *Hawaii Revised Statutes,* Chapter 703

b. *Rules and regulations of the Corrections Division,* 600.660, Use of Force; 660.670, Civil Rights of Inmates/Wards; 600.695, Assaults on and Intimidation of Correctional Workers.

c. *Corrections Division Policies and Procedures Manual,* 493.08.05, Use of Force; 493.12.01, Right to Safe Custody.

d. ACA Correctional Law Project, *Model Correctional Rules and* Regulations, 1977; ACA,

4321 Hartwick Road, Suite L-208, College Park, MD 20740.

e. Austern, David J.; Fisher, Margaret; O'Brien, Edward; *Practical Law for Correctional Personnel,* West Publishing Company, 1981; 50 West Kellogg Boulevard, P.O. Box 3526, St. Paul, MN 65165.

f. *ACA Manual of Standards for Adult Correctional Institutions,* 1977; Commission on Accreditation for Corrections, 6110 Executive Boulevard, Suite 750, Rockville, MD 20852.

g. Memorandum of DAG, June 9, 1983, Re: Permissible Use of Force by Prison Guards.

h. Memorandum of OCA, October 20, 1982, Re: Notification of Occurrences.

i. *Investigation of Allegations of the Use of Unreasonable Force Against Inmates during the Shakedown of the Oahu Community Correctional Center from December 14, 1981 through December 8,* 1981, Office of the Ombudsman State of Hawaii, September, 1983.

2.2 Definitions

a. *Physical force:* the use of body parts, objects, instruments, weapons, and/or chemical devices to restrain, subdue or intimidate.

b. *Psychological force:* the use of fear, disciplinary measures and/or programs to force conformity.

c. *Unnecessary force:* the force, which when applied, shocks the conscience, is unreasonably cruel or severe, and is beyond legitimate penal aims.

d. *Excessive force:* a term which may be used interchangeably with unnecessary force.

e. *Non-deadly force:* force which normally causes neither death nor serious bodily injury.

f. *Deadly force:* force which is likely to cause death or serious bodily injury.

g. *Mechanical Restraints:* instruments such as handcuffs, leg-irons, "belly" chains, and strait jacket.

h. *Chemical agents:* Mace, tear gas, etc.

i. Objects/Instruments: batons, yawara sticks, etc.

j. *Weapons:* Authorized handguns, shotguns, semi-automatic rifles and tear gas guns, with companion ammunition.

3.0 POLICY

3.1 The OCCC is a system in which discipline, security, custody and control are considerations of high priority. We are expected to maintain the good government and effective operation of our facility, which includes providing for the safety of staff and inmates as well as for the public's safety. Performance of this aspect of our mission means that there are circumstances in which staff may have the duty to use coercion or force. The proper use of force, and a

reasonable determination of when it is necessary, thus becomes a serious concern and a constant factor. All facility personnel must exercise restraint, caution and foresight at all times in order that:

a. occasions when force might be necessary may be forestalled, minimized, and/or defused;

b. only such force is exercised as is appropriate to insure compliance or to maintain or restore discipline;

c. force will be terminated promptly and appropriately when it is no longer needed.

3.2 Generally, the use of force against another constitutes a crime such as assault, criminal coercion, terroristic threatening, etc., and may result in criminal charges against the perpetrator. When used against an inmate, force may also violate his Constitutional Right under the Eighth Amendment, and may result in a civil law suit in which the inmate may sue the perpetrator for damages.

3.3 There are four circumstances in which a correctional officer has a right and duty to use force, which are:

a. Self-defense;

b. Defending or aiding another staff member or an inmate;

c. Preventing commission of a crime, including escape.

d. Force or coercion may become necessary to enforce institutional rules and regulations,

policies, procedures and directives. Whenever force is used, it must be appropriate or related to the results desired, the amount of force must be reasonable under the circumstances, and it must continue no longer than absolutely necessary.

4.0 PROCEDURES

4.1 Force will normally not be used in a situation until after:

a) a warning or command has been given;

b) it is determined that the inmate is going to perform or continue in undesired behavior;

c) there is no available alternative to the use of force.

The preferred forms of warning are:

a) Loud blast on a whistle;

b) Loud and/or clear verbal warning, as appropriate in situation;

c) The least preferred form of warning os [sic] to fire a round into the air, aiming slightly toward the ocean.

After the warning has been given, and often as a preferred first course of action, a clear command to stop the undesired course of action should be issued, followed by clear command(s) of what is desired or expected. This will often prevent the need for unnecessary force or coercion.

4.2 Non-deadly force shall be the first choice of force to be used if a situation dictates the use of

force. It may include the use of chemical agents, mechanical restraints, or objects/instruments.

a. *Physical force:* Only as much physical force is authorized as is necessary to serve a legitimate purpose. Where the use of physical force is initially reasonble [sic] and permissable, its continued application is not justified when the need for it ceases to exist. The use of force as punishment is never justified. When inmate behavior through verbal or physical abuse, or refusal to comply with given orders may cause a disturbance and thus may jeopardize the proper running of the institution, physical force may be used with restraint to remove perpetrator(s) from the scene in order to prevent a potential dangerous situation from further development.

   The Ombudsman's report suggests five useful guidelines which can help in the decision of when and how non-deadly physical force might be applied and be justifiable: (pp 65, 66; see all of Chapter IV)

   1) The objective to be attained must be lawful;

   2) Resistance to the attainment of the lawful objective must be evident;

   3) Reasonable alternatives, other than the use of force, were either unavailable or were tried and were unsuccessful;

   4) The force used must be minimal under the circumstances, or just that amount of force which is sufficient to overcome the resistence;

5) The minimal force used must be directly related or limited to the attainment of the lawful objective.

4.2 b. *Psychological force:* Inmate may be warned that his present behavior may lead to the use of force, loss of program participation or to other disciplinary measures. Use of psychological (verbal) force for the purpose of instilling fear into an inmate may be effective in the short term to obtain compliance to a lawful order, but it is not to be used on a frequent basis as it loses its affectiveness [sic]. Threatning [sic] with bodily harm is not permitted at any time.

c. *Chemical Agents* are to be used only under special conditions. Due concern must be given to the possibility that innocent bystanders may be victimized by the use of such agents. However, under emergency situations, the need to use agents may outweigh the protection of bystanders.

1) Chemical agents shall not be used:

a) Without approval of the Warden or his representative, if approval is possible under the circumstances;

b) By employees who have not received training in their use;

c) Repeatedly against an inmate when the inmate no longer presents a danger.

2) On every case, individuals affected by the agents shall be permitted to wash their face, eyes or other exposed skin areas as soon as possible after the use of

the agent. Anyone so exposed requesting medical attention shall be provided such care as soon as possible.

d. *Mechanical Restraints*

1) Mechanical restraints may be used when reasonably necessary and only in the following instances:

a) In transporting an inmate from place to place. An inmate's Security/Custody Classification and the event for which movement is taking place should be used as guidelines to help determine whether restraints are called for, and the type(s) of restraints to be applied. (See also 7.08.D___, Internal Movements of Inmates, Use of Restraints; 7.08.H.___, Transportation, Use of Equipment);

b) When the past history, present behavior, or apparent emotional state of the inmate creates the likelihood that bodily injury to any person or escape by the inmate will occur;

c) Under medical advice, to prevent the inmate from attempting suicide or inflecting [sic] serious injury upon himself.

2) Mechanical restraints shall never be used;

a) As a method of punishment;

b) About the neck and head of the inmate;

c) In any way that causes undue physical discomfort, inflicts physical pain or restricts the blood circulation or breathing of the inmate.

3) Handcuffs and leg-irons will be doubled-locked.

4) Periodic checks on the welfare of the restrained person will be made; restraints will be checked for effectiveness and to assure there in [sic] no undue physical discomfort, etc.

e. After the use of non-deadly force where an inmate was injured, involved in the commission of a crime, or where chemical agents were utilized, the following steps shall be undertaken:

1) If an inmate is injured, he shall be referred to the Medical Unit for examination, treatment, and/or observation at the earliest possible opportunity.

2) An employee who uses, or observes the use of force must make an immediate verbal report of the incident to the Facility Lieutenant or residency Unit Manager.

a) If the Facility Lieutenant or Unit Manager is not readily available, employee will report incident to the Central Control Station.

b) Central Control Station will locate the Facility Lieutenant, Unit Manager or Watch Supervisor and report the incident to him.

c) Facility Lieutenant, Watch Supervisor or Central Control Supervisor will order any back up or support activity that is necessary.

d) The employee(s) shall submit a complete and accurate written report to the Watch Supervisor prior to being relieved from duty.

e) Failure to submit such a report will result in disciplinary action.

3) The Watch Supervisor will provide a written summary report to the Facility Administrator within 24 hours after the incident or sooner if it is reasonable to do so. Copies of such a summary report shall be provided to the Chief of Security, the inmate's Unit Manager, and the Program Control Administrator. The Facility Administrator will forward a copy of the report, together with a supplemental report if he deems it necessary, to the Corrections Division Administrator.

4) The summary report shall include but is not limited to:

a) Summary of events leading to incident;

b) Description of the incident;

c) Reason for employing force and description of force used; i.e., objects, chemical agent, physical force;

d) List of injured or arrested;

e) List of participants and witnesses to the incident;

f) Disposition.

4.3 Deadly force shall be used only as a last resort in any circumstance and must be employed with as much good judgment as possible by the employee.

a. Deadly force may be used as a last resort in the following instances, and only when the lives of others will not be unduly jeopardized:

1) To prevent escapes;

2) To prevent an act which could result in death or serious bodily injury to one's self or to another person.

b. When deadly force is used and death or serious bodily injury occurs, the following steps shall be undertaken:

1) An employee who uses, or observes the use of, deadly force must make an immediate verbal report of the incident to the Watch Supervisor.

a) If the Watch Supervisor is not readily available, employee will report incident to the Central Control Station.

b) Central Control Station will locate the Watch Supervisor and report the incident to him.

c) Watch Supervisor or Central Control Supervisor will order any back up or support activity that is necessary.

d) The employee(s) shall submit a complete and accurate written report to the Watch Supervisor prior to being relieved from duty.

e) Failure to submit such a report will result in disciplinary action.

2) The Watch Supervisor or the Central Control Station Supervisor will contact the Branch Administrator immediately. The Program Control Administrator and the Chief of Security shall also be notified. Such notification shall be by the quickest means.

3) A verbal summary shall be given to OCA, PCA and CS of the incident.

4) Honolulu Police Department shall be notified and assistance requested if required.

5) The Watch Commander shall not be relieved until all written reports are completed and presented to the Chief of Security, or to PCA or OCA if CS is not in the facility. Watch Commander shall not depart from the facility until so permitted by whomever the written report is given to.

6) OCA will forward a copy of the written report, together with a supplemental report if he deems it necessary, to the Corrections Division Administrator.

a) OCA may make a verbal report to CDA and the Public Information Officer as soon as he learns of the

incident and may make supplementary verbal reports as he deems necessary.

b) Copies of the written report will also be sent to the Chief of Security, the inmate's Unit Manger [sic], and the Program Control Administrator.

7) Such written report shall include but is not limited to:

a) Report of the officer who used the deadly force;

b) Account of the event(s) leading to the use of deadly force;

c) A precise description of the incident and the reason for employing deadly force;

d) Description of the weapon (exact weapon must be preserved for evidentiary reasons);

e) List of all injured and treatment given;

f) List of all participants and witnesses to the incident.

4.4 Line staff, especially Adult Correctional Officers, bear the main responsibility for the implementation and enforcement of this policy.

4.5 Watch Commanders and Unit Managers are responsible to monitor the conduct of their personnel regarding the physical and psychological treatment of inmates, and to counsel, guide and assist them in the proper performance of their duties in the light of this policy and procedures.

4.6 The Program Control Administrator and the Chief of Security have these responsibilities:

a. to take affirmative steps to oversee the implementation of this policy;

b. to provide or arrange for training and periodic re-training in interpersonal communication skills, resolution of disputes, proper use of weapons and equipment, riot training and other areas related to staff proficiency in the proper treatment and control of inmates;

c. to recommend corrective/disciplinary action for employees who do not adhere to this policy.

4.7 Each year in October, the Chief of Security will review this policy and procedures, and recommend to the Program Control Administrator whether it should remain in force as written, or whether it needs revision.

4.8 If the Program Control Administrator agrees that no revision is needed, he will so report to the facility administrator for his approval/disapproval.

4.9 If the Program Control Administrator or the facility administrator decides that revision is needed. PCA will:

a. Assign a person to prepare a draft and make input.

b. He may ask others to review the draft and make input.

c. When the revised policy and procedures are acceptable, he will have them typed up in final form, and will forward them to the

facility administrator for approval/disapproval.

Effective date of this policy and procedures: Upon approval.

APPROVED: /s/ Edwin T. Shimoda
Branch Administrator

12/19/83
Date

[EXHIBIT H]

DEPARTMENT OF SOCIAL SERVICES AND HOUSING CORRECTIONS DIVISION

OAHU COMMUNITY CORRECTIONAL CENTER

MEMORANDUM

TO ALL CONCERNED

DATE June 18, 1987

FROM CS

SUBJECT ACOs ASSIGNMENT FOR JULY 1987 ROTATION

ACO Melvin Kauhane will be assigned to the Second Watch Security, with Saturday/Sundays off until further notice. He is to have NO INMATE CONTACT until further notice.

/s/ Fred Ragasa
Fred Ragasa, Chief of Security

cc: KAUHANE/LTS/CENTRAL/OCA/SU

APPENDIX "H"

[EXHIBIT "E"]

STATE OF HAWAII
DEPARTMENT OF SOCIAL SERVICES AND HOUSING

Corrections Division

INMATE COMPLAINT/GRIEVANCE

Appellant's Name: SAM KALILIKANE

Soc. Sec. No.: 576-88-8030

Branch: OCCC Counselor: LINDA KALEIWAHEA
(Name)

TO (Step) 1. ___ Section Supervisor/Parole Officer
2. ✓ Branch Administrator
3. ___ Division Administrator

RE (Check [✓] Complaint against
ACO Melvin Kauhane/ACO Wong
(Name)

[ ] Grievance based on action by Program/ Adjustment Committee

or _____
(Name)

Statement of Complaint/Grievance:

The last week of February (27th) '87 approx. 7:30 pm, I was escorted from medical unit to holding unit. On returning I was confronted by ACO Melvin Kauhane. I returned to my cell on the 3rd floor of H/U and after ten minutes had past, I was called again by ACO Wong out of my cell to go to the medical unit. My gate opened. I walked into the 3rd floor office. ACO Melvin Kauhane was sitting in a chair inside the ofice, [sic] and ACO

Wong was in his uniform at my side. ACO Melvin Kauhane then stood up and assaulted me with his fists in my face. He was unprovoked by my part and I was knocked to the floor in the corner of the room. The ring on ACO M. Kauhane hurt me badly. I remained on the floor in the corner, Melvin Kauhane continued to viciously kick my face and ribs with his boots while I was verbally threatened and abused by him. ACO Wong saw ACO Kauhane would not stop beating and kicking me, and would not be satisfied by just hurting me. So at that point ACO Wong separated ACO Kauhane from continuing to attack me. I was repeatedly threatened not mention a word of this incident. I was told that I will owe Melvin Kauhane several hundred dollars upon my release from OCCC, and threatened that I must p[er]form oral sex with ACO M. Kauhane and other men also. When I returned to my cell on the 3rd floor H/U I was hurt badly and frightened that it would all re[o]ccur. I was unable to sleep for several days. I feel that if ACO Wong was not present during this beating I received that ACO Kauhane would have killed me that evening. I'm informing the facility and will be filing a police report as well. Please assi[s]t me in any way possible. I would like this most serious matter investigate[d] fully and any information I may provide please notify me with your request.

/s/ Sam Kalilikane — 4/20/87
Signature of Inmate — Date

Decision:

Your Grievance will be investigated.

Decision of /s/ Fred Ragasa — Chief of Security
Signature — Title

April 24, 1987
Date

[EXHIBIT "I"]

Department of Social Services and Housing
Corrections Division

INCIDENT REPORT

Facility O.C.C.C.
Prepared on: 09/09/87 _____

TO: Maj. F. RAGASA (Illegible)

THRU: Lt. E. KAIAMA (Illegible)

DATE	TIME	NARRATIVE (Specify inmate name & ID and location if related to misconduct)
09/08/87	1700hrs.	

At approximately the date and time shown [September 8, 1987, at 2:00 p.m.,] [w]hile working on the desk (Second floor A/block) this writer was informed by Sgt. Manu to lock-up inmate RANDALE, Eugene in Corr. C. for four (4) hours. When said inmate came up the stairs he was escorted by Sgt. M. KAUHANE who escorted him to the strip search room. While they were in the strip search room this writer heard what appeared to be a scuffle. This writer then went to the strip room and observed both inmate Randale, and Sgt. Kauhane holding each other by the arms, and talking aloud. After about 20 seconds both parties let go of each other, after which Sgt. Kauhane went down to the first floor, and said inmate went with this writer to lock-down.

At no time did this writer see anyone hit anybody. This writer also asked inmate Randale if he was hurt. . . . Randale replied "no, he can't hurt me."

Inmate:	RANDALE, Eugene	Investigation of inmate
ADM:	02/09/87	EUGENE RANDALE
S.S.#:	444-68-3660	alleged assault was
Status:	PTF	assigned to Lt. R. Asher
		by C.S. Ragasa

/s/ EP 9-10-87

noted: /s/ J. Dukes
Referred to DCIA for Investigation.

By: /s/ Stephen Adams — ACO III
Reporting Officer — Title

9-9-87 Inmate Eugene Randale examined by Dr. Kimbrell for alleged injuries sustained 9-9-87. Richard Ancoy took photographs. HPD report filed by inmate alleges officer Melvin Kauhane assaulted him on his return from chow while in the strip room on the 2nd floor of cell block – "A".[*]

Noted: /s/ Lt. E. Kaiama

---

* remarks by Lt. E. Kaiama originally appeared handwritten in the margin of this document.

[EXHIBIT "W"]

[SHIMODA DEPOSITION]

* * *

[p. 40] Q. So with respect to OCCC, it's still your testimony and your position that there is no specific policy as to whether or not an ACO that has been the subject of alleged assaults has to be separated from contact with inmates?

A. I'm not familiar with what the present policy at OCCC is.

Q. On or about the time of the Burgo assault is the time that I'm concerned with, not the present policy.

A. There was no specific OCCC policy, yes.

Q. Could there have been a specific OCCC policy?

A. Could there have been?

Q. In other words, did you as branch administrator have the power and authority to promulgate policies peculiar to OCCC –

A. Yes.

* * *

[EXHIBIT "GG"]

[FALK DEPOSITION]

* * *

[p. 14] [Q.] Do you know what was meant or contemplated by the word "reassigned"?

A. "Reassigned" would be a reassignment to a task or a job or a position where they would not be in a position again to act out their problem.

Q. With respect to that comment, when you say they would not be in a position to act out their problem, does that reassignment, then, only concern specific job posts or does it also, in your mind, concern when they're not in their post and they may have the opportunity to come into contact with inmates and cause a conflict or act out their problem?

A. You could not very well control that kind of a situation because you are in a prison setting, and anyone within the prison setting, whether they were involved in an assignment that dealt directly with inmates or not, would at some time of the day be in contact with inmates, you know, as they went about – for instance, if a guard were assigned to a clerical position, for instance, to keep him from having contact with inmates, unless you denied him access to the facility[.]

* * *

APPENDIX "I"

ARTICLE V

SUSPENSION AND DISMISSALS

I. Suspension or dismissal of any employee of the Corrections Division shall be pursuant to Article IV of the Rules of Conduct of the Corrections Division, Department of Social Services and Housing.

II. The below enumerated employee positions of the Corrections Division, Department of Social Services and Housing, are authorized to execute suspensions in accordance with the Rules of Conduct and Directives of the Corrections Division.

Type of Action	Authority
Dismissal	DIR
Suspensions - 30 calendar days	DIR/DA/BA
Other*	
Written reprimands	Supervisors
Oral reprimands	Supervisors
Counselling	Supervisors

* Amount	HMSF/ OCCC HHSF/ WCCC	HYCF	Other CCCs (KCF & WCF)
20 Working Days	PCA, SSA, CS	CA, Section Heads	- 0 -
10 Working Days	Capt., DUTM	- 0 -	Capt.
4 Working Days	Supervisors	Supervisors	Supervisors

III. Administrative and supervisory positions listed shall suspend from duty any subordinate Corrections Officer or employee whenever necessary for the preservation of good order, efficiency and discipline or for the good of the Division. The following procedure shall be followed when a suspension of dismissal action is contemplated against a regular civil service employee.

A. Conduct a full investigation or fact-finding of the particular incident giving rise to the contemplated suspension or dismissal action. Whenever possible, this investigation should include discussions with the employee about the incident, act, or wrongdoing. The employee may have a representative present at the meeting *if they choose or request* such representative.

B. After the investigation/fact-finding, develop details of the specific charges/allegations. In doing so, the "who, what, where, when, and how" aspects should be fully stated.

C. Based on the charges/allegations, the employee's past disciplinary record, the employee's past work record, and any mitigating circumstances, determine whether a suspension or dismissal action can be supported and recommended to the appropriate authority.

D. In issuing a letter of reprimand or suspension, the appropriate authority shall comply with the following requirements for written notice:

1. The appropriate authority shall give notice to a regular employee in writing of the reprimand or suspension setting forth the specific reasons for the actions and a statement of

the employee's appeal rights. For suspension notices, include the period of suspension.

2. A copy of the notice of any written reprimand or suspension shall be sent to the director via the chain of command, attention Personnel Office, concurrently upon issuance of the notice to the employee. For Units 01 and 10, a copy of the notice shall be sent to the United Public Workers (union).

3. The appropriate authority shall give the employee written notice before a suspension of five (5) or more working days takes place.

4. For a suspension of four (4) or less working days, written notice shall be given to the employee within forty-eight (48) hours before the suspension.

5. The appropriate authority shall issue a letter of reprimand to the employee within seven (7) working days after the incident giving rise to the letter of reprimand. The seven (7) working day requirement shall nor apply in certain mitigating situations such as, but not limited to:

   a. The affected employee being unavailable during the seven (7) day period to present evidence and arguments on the employee's own behalf;

   b. A complete investigation cannot be concluded within seven (7) working days due to witnesses or information not being readily available.

6. In the event that the appropriate authority is unable to serve the required written notice

upon the affected employee, the notice shall be mailed to the employee's last known address within the time limitations prescribed above.

7. Dismissal actions shall be processed through administrative channels and in accordance with the State of Hawaii Procedures for Contemplated Dismissal Action Against (Regular) Civil Service Employees.

E. A Corrections Officer shall not wear his uniform or any part thereof during the period of suspension or pending the appeal of a dismissal

F. An employee shall not receive any compensation for the period of any suspension or pending the appeal of his dismissal.

No. 93-783

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October Term, 1993

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Petitioner,

vs.

RONALD S. BURGO, MELVIN KAUHANE, *Sergeant, Oahu Community Correctional Center,* and HAROLD FALK, *Director, Department of Corrections,*

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE OF RESPONDENT HAROLD FALK IN SUPPORT OF PETITIONER

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RESPONSE OF RESPONDENT HAROLD FALK IN SUPPORT OF PETITIONER

Pursuant to this Court's Rule 12.4, Respondent Harold Falk files this response in support of Petitioner. Mr. Falk, who at relevant times in this case was Director of the Department of Corrections, State of Hawaii, is named as a nominal respondent in this case. *See* Pet. at ii. Director Falk was originally named as a defendant in, and was dismissed by, the District Court pursuant to *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), and its progeny. Respondent Falk had no standing to appeal the decision

of the District Court adverse to Petitioner Edwin T. Shimoda, Administrator, Oahu Community Correctional Center, and, therefore, no standing to file as a Petitioner in this case. Respondent Falk nonetheless fully supports the Petition for Certiorari, and requests that it be granted according to its terms. Director Falk's counsel, undersigned, received the Petition by mail on November 22, 1993, and, under this Court's Rule 12.4, this response in support of Petitioner is timely.

Dated: Honolulu, Hawaii, December 9, 1993.

Respectfully submitted,

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RESPONDENT RONALD S. BURGO'S BRIEF IN OPPOSITION

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT RONALD S. BURGO'S BRIEF IN OPPOSITION

Respondent Ronald S. Burgo respectfully requests that this Court deny the petition for Writ of certiorari, seeking review of the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in C.A. No. 92-16352 (9th Cir.) on March 17, 1993, as amended by the opinion and judgment entered herein on august 18, 1993.

BRIEF STATEMENT OF THE CASE

On April 20, 1987, Samuel Kalilikane, an inmate at the Oahu Community Correctional Center, filed a grievance stating that he was viciously assaulted on February 27, 1987, by Melvin Kauhane, a Sergeant and Adult Correctional Officer ("ACO Kauhane"). *See* Pet at A67-69. As a result of the investigation, ACO Kauhane was subjected to a "no inmate contact" pursuant to an order entered on June 18, 1987. *See* Pet. at A36-37. According to this notice, "ACO Melvin Kauhane will be assigned to the Second Watch Security, with Saturday/Sundays off until further notice. He is to have NO INMATE CONTACT until further notice." *See* Pet. at A66.

Despite the no inmate contact order, on September 9, 1987. ACO Stephen Adams filed an incident report involving ACO Kauhane and another inmate. In the report, ACO Adams described that he witnessed ACO Kauhane escorting an inmate to the strip search room. ACO Adams then heard what appeared to be a scuffle and upon entering the room to investigate, observed both men "holding each other by the arms and talking aloud." *See* Pet. at A70-71.

It is undisputed that Petitioner, who was then the administrator of the Oahu Community Correctional Center, had knowledge of the no inmate contact order and the subsequent investigation of ACO Kauhane's "scuffle" with an inmate. *See* Pet. at A36-37.

On March 26, 1988, ACO Kauhane severely beat inmate Ronald S. Burgo, respondent herein, resulting in serious and permanent injuries. *See* Pet. at 2-3.

REASONS WHY THE WRIT SHOULD BE DENIED

The Ninth Circuit Court Fully Considered And Correctly Decided The Issues Presented.

Petitioner confuses the requirement to establish a violation of Burgo's constitutional rights with the standard of care required by a prison official to avoid personal liability. The Ninth Circuit was correct in first identifying the right that was allegedly violated and whether that right was clearly established at the time of the alleged violation. *See* Pet. at A9.

The appellate court correctly determined that at the time of the assault on Burgo in March, 1988, it was clearly established that the use of excessive force against a prisoner by prison personnel violated the prisoner's eighth amendment rights. *See* Pet. at A10-11 (citing *McRorie v. Shimoda,* 795 F.2d 780 (9th Cir. 1986)). Even under the heighten standard propounded by the petitioner by this Court's recent decision in *Helling v. McKinney,* 113 S. Ct. 2475 (U.S. June 18, 1993), petitioner's inaction despite knowledge of ACO Kauhane's continued contact with prisoners, clearly exposed each inmate who came in contact with ACO Kauhane to serious risk. Petitioner's failure to act can easily be considered to "be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *See* Pet. at 16 (citing *Helling v. McKinney* at 2482). Relying on *Helling,* petitioner attempts to convince this Court that environmental risks, *i.e.* tobacco smoke, is akin to being brutally assaulted by a corrections officer. Nor can petitioner rely on his statements that ACO Kauhane's actions, which resulted in emergency surgery to wire Burgo's jaw,

"would not have been held unconstitutional at all unless it was imposed 'maliciously and sadistically to cause harm.' " *See* Pet. at 16 (quoting *Hudson v. McMillian*, 112 S. Ct. 995, 999 (1992)). Petitioner cannot expect this Court to believe that the injuries resulting from ACO Kauhane's actions were done unintentionally.

In this case, the record clearly reveals a violation of Burgo's constitutional right from the use of excessive force by ACO Kauhane. Accordingly, the Ninth Circuit was correct in affirming the district court's determination that Burgo's right not to be subjected to excessive force by prison personnel was clearly established.

The Ninth Circuit was also correct in applying the "deliberate indifference" standard instead of the standard petitioner urged which was the Burgo must prove that the petitioner had acted "maliciously or sadistically" to Burgo's right. At the time the incident occurred, it was well established in the Ninth Circuit that prisoners could state a claim against prison personnel under 42 U.S.C. § 1983 by establishing that prison personnel acted with deliberate indifference in creating the condition that violated their constitutional rights. *Leer v. Murphy*, 844 f.2d 628, 633 (9th Cir. 1988) (citing *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) and *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986)). It was the responsibility of the supervisory prison personnel not to act with deliberate indifference to Burgo's right not to be subjected to excessive force.

Contrary to petitioner's argument that "the Ninth Circuit cut off Petitioner's qualified immunity argument at the knees" by freezing preexisting law at the court of

appeals level at the time Petitioner acted; petitioner cannot dispute that this Court held in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), that immunity does not exist if the unlawfulness is apparent in light of preexisting laws. *See* Pet. at 22. The standard that must be applied is the law that is in existence at the time the violation occurred. Clearly, any person cannot be expected to foresee the changes in the law years in advance and adjust their actions accordingly. The law is a dynamic entity and constantly evolving with time. Without application of the preexisting law at the time of the violation, neither the petitioner nor the respondent would know what rights each are afforded if those rights could be extinguished by a change during litigation.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: Honolulu, Hawaii, February 14, 1994.

MICHAEL F. MCCARTHY
DAVID K. TANOUE
KEN HARIMOTO
Attorneys for Respondent
Ronald S. Burgo

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PETITIONER'S REPLY MEMORANDUM

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II. As Demonstrated by this Court's Decisions in *Elder v. Holloway*, No. 92-8579 (U.S. Feb. 23, 1994), and *Caspari v. Bohlen*, No. 92-1500 (U.S. Feb. 23, 1994), Respondent's Argument that Post-Act Precedent Cannot Be Relevant to Qualified Immunity Analysis Confirms that the Ninth Circuit's Judgment Undermines this Court's Authoritive Position as Final Arbiter of the Federal Constitution, is Contrary to *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993), and Disregards Qualified Immunity Analysis 5

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PETITIONER'S REPLY MEMORANDUM

ARGUMENT

I. Respondent's Total Failure to Address the Pendency of *Farmer v. Brennan*, No. 92-7247 (U.S. argued Jan. 12, 1994), as Well as the Undisputed Facts Relating to Petitioner Shimoda's Conduct in the Present Case, Virtually Confesses that the Ninth Circuit's Judgment Rejecting Immunity Should Be Summarily Reversed, or, at a Minimum, that this Court Should Grant Certiorari.

As this Court held only days ago in its decision in *Elder v. Holloway*, No. 92-8579 (U.S. Feb. 23, 1994), the

lower courts are bound "to consider, in light of *all* relevant authority . . . , whether [state officials] are entitled to prevail on their qualified immunity defense." *Id.*, Slip Op. at 6 (emphasis added). It goes without saying that the *most* "relevant authority" bearing on the issue of qualified immunity, *i.e.*, the issue whether one or more questions of federal law material to a plaintiff's affirmative claim under 42 U.S.C. § 1983 "w[ere] open at the time [the official] acted," *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985), is a decision of *this* Court signifying there is a "legitimate question," *id.*, over the scope of material federal right. *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam).

Such a precedent is exactly what is present in this case, for as Petitioner has argued, the very grant of review in *Farmer v. Brennan*, No. 92-7247 (U.S. argued Jan. 12, 1994), indicates a substantial division in the courts of appeals over the circumstances under which high-level prison officials can be held responsible under the Eighth Amendment for violent actions committed by third parties within a prison setting. *See* Pet. at 27. Indeed, regardless whether the prison officials win or lose the merits issues at stake in *Farmer*, the conflicts in the circuits which have engendered this Court's decision to review the Seventh Circuit's Eighth Amendment analysis in *Farmer* absolutely compel reversal of the Ninth Circuit's denial of immunity here.

Respondent asserts "petitioner's inaction despite knowledge of ACO Kauhane's continued contact with prisoners, clearly exposed each inmate who came in contact with ACO Kauhane to serious risk." Resp. Br. at 3. But this ignores the undisputed facts that Petitioner

Shimoda (a) had promulgated extensive policies prohibiting the use of "excessive force"; (b) established a practice of placing guards accused of physical misconduct into "no-contact" positions, and saw to it that correctional officer Kauhane was indeed *ordered* into such a position; (c) saw to it that incidents involving Kauhane were investigated, first, by sending the matter to the Department's internal affairs office (over which Shimoda had no control), and then by a referral to Shimoda's own investigative staff; and (d) directed follow-up from his own staff investigators when it appeared to Shimoda that the second investigation was taking too long. *See* Pet. at 2-9, 27. For his part, Respondent Burgo does not refute any of this, and even admits that the incident which assertedly placed Petitioner "on notice" consisted of nothing more than correctional officer Kauhane's alleged " 'scuffle' with an inmate." Resp. Br. at 2.

As the Solicitor General argued recently in *Farmer:*

> [T]he threat of assault by another inmate is not like the risk of a static prison condition. Compare *Helling v. McKinney, supra* (addressing the risk of second-hand or "passive" smoke). Inmate violence is often random and unpredictable, and may depend on the temporary presence of particularly violent individuals. Such violence can never been fully controlled, despite prison officials' best efforts. See *e.g., Bruscino v. Carlson,* 854 F.2d 162 (7th Cir. 1988) (detailing inmate violence at USP-Marion), *cert. denied,* 491 U.S. 907 (1989). Because day-to-day life in prisons housing violent offenders exposes inmates to a possibility of violence that may be present despite reasonable measures on the part of prison officials to ensure security, the risk of

> inmate assaults that is inevitably present in such facilities is not sufficient to satisfy the objective component of the Eighth Amendment. Rather, to be actionable, the risk of inmate assaults must rise significantly above the level that is ordinarily prevalent in facilities housing dangerous offenders. The level of risk to which the complaining inmate is exposed must "be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Helling*, 113 S. Ct. at 2482. Such a risk of violence is not ordinarily shown by pointing to isolated incidents [.]

Br. For Respondents at 12-13, No. 92-7247. In turn, even under the "deliberate indifference" standard, "the prison official must know of the risk of harm to which an inmate is exposed, or he must actively avoid such knowledge," "and he must fail to take readily available action to prevent the harm from occurring." *Id.* at 16. Translated to the context of managing civil correctional employees who are presumed innocent, who enjoy substantial Due Process and contractual rights vis a vis their job status, who, under this Court's decisions (*see Hudson v. McMillian*, 112 S. Ct. 995 (1992); *Whitley v. Albers*, 475 U.S. 312 (1986)), have substantial discretion, for Eighth Amendment purposes, to use force within the prison setting, and where the "facts" supposedly alerting the prison official to the "risks" at issue are, in significant regard, accusations by convicted felons, these arguments show that the Ninth Circuit was wrong to deny immunity here, *regardless* of how *Farmer* is decided.

II. As Demonstrated by this Curt's Decisions in *Elder v. Holloway*, No. 92-8579 (U.S. Feb. 23, 1994), and *Caspari v. Bohlen*, No. 92-1500 (U.S. Feb. 23, 1994), Respondent's Argument that Post-Act Precedent Cannot Be Relevant to Qualified Immunity Analysis Confirms that the Ninth Circuit's Judgment Undermines this Court's Authoritive Position as Final Arbiter of the Federal Constitution, is Contrary to *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993), and Disregards Qualified Immunity Analysis.

Respondent boldly argues that "[t]he law is a dynamic entity and constantly evolving with time," Resp. Br. at 5, and for that reason, neither the grant of certiorari in *Farmer* (nor anything this Court might say there on the *merits* of Respondent's claim against Administrator Shimoda), nor the substantial clarification of Eighth Amendment doctrine in such decisions as *Wilson v. Seiter*, 111 S. Ct. 2321 (1991), *Hudson v. McMillian*, 112 S. Ct. 995 (1992), and *Helling v. McKinney*, 113 S. Ct. 2475 (1993), can be relevant to Petitioner's qualified immunity.

This reasoning completely inverts qualified immunity analysis. As this Court held in *Elder*, a court of appeals must consider "*all* relevant authority" in determining whether a state official is entitled to qualified immunity. Respondent's position, taken seriously, means that the courts of appeals are essentially powerless to consider the most critical and persuasive "authority" of all: a decision by *this* Court that the lower federal courts are divided on a material question of federal law, or that there is an "important question of federal law which has not been, but should be, settled by this Court." S. Ct. R. 10.1. Indeed, as this Court ruled the same day it decided

Elder, recent precedent, handed down after the relevant decision-makers have acted, can be quite "relevant" to immunity analysis, either by making clear that a material issue of federal law remains open, or by acknowledging a conflict and then resolving it. *See Caspari v. Bohlen*, Slip Op. at 8, No. 92-1500 (U.S. Feb. 23, 1994) (states' immunity from federal habeas corpus reversals under *Teague v. Lane*, 489 U.S. 288 (1989)). The Ninth Circuit's refusal to consider *any* legal development occurring after the acts and omissions for which Burgo is suing took place is plainly contrary to this precedent, and flouts the decision of this Court in *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993). Certainly, if, as we argue, and, as *Harper* dictates, a new precedent means that Burgo's federal rights were not violated "at all," *Siegert v. Gilley*, 111 S. Ct. 1789, 1793 (1991), then this Court's treatment of basic issues underlying inmate Burgo's affirmative case must be part of the "relevant precedents," *Elder, supra*, bearing on immunity.

While Respondent labors to show that there was "a violation of Burgo's constitutional right [to be free] from the use of excessive force by ACO Kauhane," Resp. Br. at 4, *this* case is not about whether ACO Kauhane is liable to Respondent. *This* case concerns whether, on the record here, Administrator Shimoda was " 'plainly incompetent' " or " 'knowingly violated the law.' " *Burns v. Reed*, 111 S. Ct. 1934, 1944 (1991). In addition to ignoring the grant of review in *Farmer, supra*, Burgo does not deny that the decisions in *Seiter, Hudson*, and *Helling, if* part of the "relevant precedent" which the Ninth Circuit was bound to consider, require reversal of the judgment here. Instead, Burgo's main argument is that his asserted "rights" to collect damages from Mr. Shimoda cannot be "extinguished" (Resp. Br. at 5) by a decision of this Court. This cannot be the law.

CONCLUSION

For the reasons above, and those stated in the Petition, the Petition for Certiorari should be granted. Because the court of appeals did not have the benefit of this Court's decisions in *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993), *Helling v. McKinney*, 113 S. Ct. 2475 (1993), and *Elder v. Holloway*, No. 92-8579 (U.S. Feb. 24, 1994), the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of those decisions. The Court may also wish to grant the petition, vacate the judgment, and remand for further consideration in light of the grant of certiorari in *Farmer v. Brennan*, No. 92-7247 (U.S. cert. granted Oct. 4, 1993), or to hold this case pending decision in *Farmer*.

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